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No. 94 947 NOV 23 1994

In the Supreme Court of the United States

OCTOBER TERM, 1994

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

TOWN & COUNTRY ELECTRIC, INC., AND AMERISTAFF PERSONNEL CONTRACTORS, LTD.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

DREW S. DAYS, III
Solicitor General

FREDERICK L. FEINSTEIN
General Counsel

LAWRENCE G. WALLACE
Deputy Solicitor General

LINDA SHER
Acting Associate General Counsel

PAUL A. ENGELMAYER
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

NORTON J. COME
Deputy Associate General Counsel

PETER WINKLER
Attorney
National Labor Relations Board
Washington, D.C. 20570

QUESTION PRESENTED

Whether the National Labor Relations Board reasonably determined that a person applying for or holding a job with an employer that he intends to organize, and who will be compensated by a union for his organizational activity, is an "employee" within the meaning of Section 2(3) of the National Labor Relations Act (29 U.S.C. 152(3)) and therefore protected against discrimination on account of his union activity and affiliation.

PARTIES TO THE PROCEEDINGS

In addition to the parties listed in the caption, the following was a party to the proceedings in the court below: International Brotherhood of Electrical Workers, Local 292.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provision involved	2
Statement	2
Reasons for granting the petition	11
Conclusion	30
Appendix A	1a
Appendix B	12a

TABLE OF AUTHORITIES

Cases:

American Hosp. Ass'n v. *NLRB*, 499 U.S. 606 (1991) 15
Anthony Forest Products Co., 231 N.L.R.B. 976 (1977) 20, 27
Bayside Enterprises, Inc. v. *NLRB*, 429 U.S. 298 (1977) 12
Beth Israel Hosp. v. *NLRB*, 437 U.S. 483 (1978) .. 12
Chevron U.S.A. Inc. v. *National Resources Defense Council, Inc.*, 467 U.S. 837 (1984) 12, 24
Dee Knitting Mills, Inc., 214 N.L.R.B. 1041 (1974), enforced mem., 538 F.2d 312 (2d Cir. 1975) 27
Edward G. Budd Manufacturing Co. v. *NLRB*, 138 F.2d 86 (3d Cir. 1943), cert. denied, 321 U.S. 778 (1944) 20
Escada (USA), Inc., 304 N.L.R.B. 845 (1991), enforced mem., 970 F.2d 898 (3d Cir. 1992) 27
Escada (USA) Inc. v. *NLRB*, 970 F.2d 898 (3d Cir. 1992) 9, 24, 27
Fall River Dyeing & Finishing Corp. v. *NLRB*, 482 U.S. 27 (1987) 12, 18
George A. Hormel & Co. v. *NLRB*, 962 F.2d 1061 (D.C. Cir. 1992) 25

Cases—Continued: Page

H.E. Zachry Co., 289 N.L.R.B. 838 (1988), enforcement denied, 886 F.2d 70 (4th Cir. 1989) 7
H.B. Zachry Co. v. *NLRB*, 886 F.2d 70 (4th Cir. 1989) 9, 24, 25
Kelley v. *Southern Pac. Co.*, 419 U.S. 318 (1974) 14
NLRB v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775 (1990) 12, 18
NLRB v. *E.C. Atkins & Co.* v. *NLRB*, 331 U.S. 398 (1947) 13
NLRB v. *Elias Brothers Big Boy, Inc.*, 327 F.2d 421 (6th Cir. 1964) 9, 24
NLRB v. *Erie Resistor Corp.*, 373 U.S. 221 (1963) 12
NLRB v. *Hearst Publications, Inc.*, 322 U.S. 111 (1944) 13
NLRB v. *Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170 (1981) 12
NLRB v. *Henlopen Manufacturing Co.*, 599 F.2d 26 (2d Cir. 1979) 9, 20, 23-24, 26, 27
NLRB v. *Transportation Management Corp.*, 462 U.S. 393 (1983) 12
NLRB v. *United Food & Commercial Workers Union*, 484 U.S. 112 (1987) 12
Nationwide Mutual Insurance Co. v. *Darden*, 112 S. Ct. 1344 (1992) 13
Oak Apparel, Inc., 218 N.L.R.B. 701 (1975) 15, 27
Packard Motor Car Co. v. *NLRB*, 330 U.S. 485 (1947) 13
Phelps Dodge Corp. v. *NLRB*, 313 U.S. 177 (1941) 8, 12, 16, 22, 23
Republic Aviation Corp. v. *NLRB*, 324 U.S. 793 (1945) 16, 21
Sunland Construction Co., 309 N.L.R.B. 1224 (1992) 8, 15, 16, 17, 18, 27
Sure-Tan, Inc. v. *NLRB*, 467 U.S. 883 (1984) 13, 23
Texaco, Inc. v. *NLRB*, 462 F.2d 812 (3d Cir.), cert. denied, 409 U.S. 1008 (1972) 21
Ultrasystems Western Constructors, Inc. v. *NLRB*, 18 F.3d 251 (4th Cir. 1994) 24

Cases—Continued: Page

Willmar Electric Service, Inc., 303 N.L.R.B. 245 (1991), enforced, 968 F.2d 1327 (D.C. Cir. 1992), cert. denied, 113 S. Ct. 1252 (1993) 21-22
Willmar Electric Service, Inc. v. *NLRB*, 968 F.2d 1327 (D.C. Cir. 1992), cert. denied, 113 S. Ct. 1252 (1993) 9, 14, 15, 23, 24, 25, 26

Statutes:

Labor Management Relations Act, 1947, ch. 120, § 101, 61 Stat. 137 14-15
Labor Management Relations Act, 1947, Tit. III, 29 U.S.C. 185-187 15
§ 302(a), 29 U.S.C. 186(a) 15
§ 302(c)(1), 29 U.S.C. 186(c)(1) 15
National Labor Relations Act, ch. 372, §2(3), 49 Stat. 450 (1935) 14
National Labor Relations Act, 29 U.S.C. 151 *et seq.*:
§ 2(3), 29 U.S.C. 152(3) ..... *passim*
§ 7, 29 U.S.C. 157 6
§ 8(a)(1), 29 U.S.C. 158(a)(1) 6, 7, 9, 18, 20, 24, 26
§ 8(a)(3), 29 U.S.C. 158(a)(3) 6, 7, 18, 20, 24, 26

Miscellaneous:

Black's Law Dictionary (6th ed. 1990) 22
79 Cong. Rec. 9686 (1935) 14
Legislative History of the National Labor Relations Act of 1935 (1949):
Vol. I 14
Vol. II 14
National Labor Relations Board: Hearings on S. 1958 Before the Senate Comm. on Educ. and Labor, 74th Cong., 1st Sess. (1935) 14
Restatement (Second) of Agency (1958) 8, 10, 14, 25

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, App., *infra*, 1a-11a, is reported at 34 F.3d 625. The decision and order of the National Labor Relations Board, App., *infra*, 12a-42a, and the decision and recommended order of the administrative law judge, App., *infra*, 43a-135a, are reported at 309 N.L.R.B. 1250.

JURISDICTION

The judgment of the court of appeals was entered on August 31, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 2(3) of the National Labor Relations Act (Act), 29 U.S.C. 152(3), provides:

> The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this [Act] explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C. 151 et seq.], as amended from time to time, or by any other person who is not an employer as herein defined.

STATEMENT

This case involves the determination of the National Labor Relations Board (Board) that a "paid union organizer" applying for or holding a job with an employer that he intends to organize is an "employee" within the meaning of Section 2(3) of the Act and is therefore entitled to the protections that the Act affords to employees.[1] The Board thus held

[1] The term "paid union organizer," as used by the Board in its decisions and as used in this petition, encompasses both (1) union officials who draw a salary from the union, and (2) union members to whom the union pays a stipend in return for their organizational efforts. This case involves persons in both categories.

that respondents had violated the Act by refusing to consider union-member applicants for employment on account of their union affiliation, and by discharging a newly hired union-member employee for engaging in organizational activity protected by the Act. The court of appeals refused to enforce the Board's order, holding that the Board had erred in concluding that paid union organizers are "employees" under the Act.

1. Respondent Town & Country Electric, Inc., is a large nonunion electrical contractor based in Wisconsin. In early September 1989, Town & Country was awarded a contract to perform electrical renovation work at a paper mill in International Falls, Minnesota. App., *infra*, 2a. After being awarded the contract, Town & Country learned that Minnesota requires an electrical contractor to employ at least one electrician licensed by that State for every two unlicensed electricians working at a job site. At the time, none of Town & Country's electricians had a Minnesota license. *Ibid.*

To help it recruit Minnesota-licensed electricians, Town & Country retained respondent Ameristaff Personnel Contractors, Ltd., an employment agency. App., *infra*, 2a. Town & Country instructed Ameristaff that applicants had to be able to work in a nonunion shop. *Id.* at 16a. On September 3, 1989, Ameristaff advertised for "licensed journeymen electricians" in a Minneapolis newspaper. Applicants responding to the advertisements were asked, *inter alia*, whether they preferred to work union or nonunion. *Ibid.* Ameristaff arranged for interviews with

seven applicants to be held September 7, 1989, at a Minneapolis hotel. *Id.* at 2a-3a, 16a.

Members of the International Brotherhood of Electrical Workers, Locals 292 and 343 (the Union), learned of the job. The Union encouraged its unemployed members to apply, with the understanding that those members, if hired, would attempt to organize the job site. The Union had established a fund to reimburse members for wage, travel, and health-benefit differentials incurred on nonunion jobs. App., *infra*, 16a.

On September 7, 1989, officials of respondents appeared at the hotel to interview applicants. Only one of the seven applicants with a scheduled interview was present. App., *infra*, 3a. Also present for interviews were approximately one dozen members of the Union, two of whom were full-time paid union officials, and the rest of whom were unemployed electricians. *Id.* at 3a, 17a. Respondents' officials interviewed the nonunion applicant and a union member who had no appointment but who stated that he had to leave soon to care for his children. Neither was hired. *Id.* at 3a, 17a.

Steven Buelow, Ameristaff's president, then advised the remaining applicants, all of whom were union members, that the job was nonunion. The union members stated that they were interested in any job available. App., *infra*, 18a. Buelow then advised Ron Sager, Town & Country's manager of human resources, that he had concluded that the remaining applicants were all "union." *Id.* at 3a, 18a. Sager thereupon cancelled further interviews. *Id.* at 3a, 18a.

One of the unemployed union members, Malcolm Hansen, protested that he had called Ameristaff that

morning and had been told to report for an interview at the hotel, and that he would refuse to leave until interviewed. App., *infra*, 3a, 18a-19a. Sager at first threatened to have the union members forcibly removed. *Id.* at 19a. Sager then stated that he would check on Hansen's situation and honor the commitment to Hansen if Hansen's account was verified. *Ibid.* Upon obtaining verification of that account, Sager interviewed Hansen, and hired him. *Id.* at 3a-4a, 19a. Sager advised the remaining union members that he would not interview them, despite Town & Country's stated need for more than one licensed electrician, and despite the fact that only five days remained before work on the project was to commence. *Id.* at 19a, 56a.

Hansen's job began on September 12, 1989. The following day, during a recess, Hansen announced that he was seeking to organize employees for the Union. App., *infra*, 4a, 91a. Town & Country's project superintendent, who was present, immediately telephoned his superiors. When he returned from the call, he told Hansen that Hansen would be fired if he continued to talk about the Union. *Id.* at 91a-92a. The following day, at the noon recess, Hansen sought to convince the work crew of the merits of union organization. *Id.* at 102a. Later that day, Hansen was discharged. *Id.* at 4a, 100a, 106a-107a.[2]

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[2] The company's stated reason for the discharge was that it had terminated its contract with Ameristaff, having learned that, under Minnesota law, an electrical contractor could not use temporary employees such as Hansen from an employment agency; rather, all employees had to be directly employed by the contractor. Town & Country, however, rejected Hansen's request that the company hire him directly. App., *infra*, 4a, 107a.

2. The Board's General Counsel issued a complaint alleging, *inter alia*, that respondents violated Section 8(a)(1) and (3) of the Act, 29 U.S.C. 158(a)(1) and (3), by refusing to consider the union members for employment because of their union affiliation, and by terminating Hansen because of his union activities.[3] Respondents contended that they had acted for nondiscriminatory reasons, and that, in any event, neither the applicants nor Hansen were bona fide "employees" within the meaning of Section 2(3) of the Act, 29 U.S.C. 152(3). App., *infra*, 20a-21a.

a. The administrative law judge (ALJ) found that respondents had violated Section 8(a)(1) and (3) of the Act. He found that respondents had refused to consider the job applicants for employment because of their presumed union affiliation. App., *infra*, 56a-69a. He further found that Town & Country had terminated Hansen's employment because of his attempts to unionize the other electricians. *Id.* at 109a. The ALJ rejected Town & Country's claim that Hansen had been fired for poor performance, terming that claim a "thinly veiled attempt to mislead as to the true reasons" for the discharge, and

[3] Section 8(a)(1) of the Act makes it an unfair labor practice "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7]." 29 U.S.C. 158(a)(1). Section 7 of the Act grants employees the right, *inter alia*, "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining." 29 U.S.C. 157. Section 8(a)(3) of the Act makes it an unfair labor practice to discriminate "in regard to hire or tenure of employment * * * to encourage or discourage membership in any labor organization." 29 U.S.C. 158(a)(3).

finding the claim to be "lacking in credible support." *Id.* at 121a.

The ALJ also rejected respondents' claim that the union members were not "employees" under the Act. Following the Board's ruling in *H.B. Zachry Co.*, 289 N.L.R.B. 838 (1988), enforcement denied, 886 F.2d 70 (4th Cir. 1989), that paid union organizers are "employees" within the meaning of Section 2(3) of the Act, the ALJ found that the two union officials and the other union members who had applied for employment were protected by the Act against discrimination based on their union activity or affiliation. App., *infra*, 53a n.13. Hansen's goal of organizing the other electricans did not deprive him of the Act's protection, the ALJ held. Rather, Hansen was "a rank-and-file union member," and "was dependent financially on employment as a journeyman electrician in the construction industry." *Id.* at 107a n.69. Thus, "Hansen's intention to organize was not incompatible with his basic employment needs and objectives and did not debar him from statutory protection." *Ibid.*

b. The Board, in agreement with the ALJ, concluded that respondents had violated Section 8(a)(1) and (3) of the Act, by refusing to interview the union members and by discharging Hansen. App., *infra*, 12a-42a.[4]

The Board reconsidered and reaffirmed its position in *Zachry* that paid union organizers are "employees" within the meaning of Section 2(3) of the Act and are therefore protected against discriminatory refusals to hire and discriminatory termina-

[4] The Board adopted the ALJ's findings of fact. App., *infra*, 13a & n.3.

tion. App., *infra*, 22a, 32a-33a.[5] The Board noted that applicants for employment have been held to be "employees" within the meaning of Section 2(3) ever since *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177 (1941). App., *infra*, 22a. The fact that an applicant is a paid union organizer seeking to unionize an employer's work force does not change that result, the Board reasoned. Section 2(3) defines "employee" as "any employee," and paid union organizers do not fall within any of the Act's specific exclusions. *Id.* at 23a-24a. Moreover, both the legislative history and this Court's interpretations of the Act support a broad definition of the statutory term "employee." *Id.* at 24a-29a For a paid union organizer simultaneously to be an "employee" of another entity also comports with the common law principles of agency to which this Court has looked to define the term "employee" in cases in which it was left undefined by statute, the Board concluded. Under the common law, "[a] person may be the servant of two masters, not joint employers, at one time as to one act, if the service to one does not involve abandonment of the service to the other." *Id.* at 28a (quoting Restatement (Second) of Agency § 226, at 498 (1958)). Finally, protecting paid union organizers as "employees" furthers the Act's goal of promoting the right to organize, while leaving intact management's legitimate rights to direct and control employees under its supervision and to limit union solicitation to nonwork time. *Id.* at 33a-39a.

As a remedy, the Board adopted the ALJ's recommended order that Town & Country, *inter alia*, offer

[5] The Board reached the same result in a companion case. See *Sunland Construction Co.*, 309 N.L.R.B. 1224 (1992).

employment to Hansen and the union members who had been denied interviews, and make the union members whole for any losses suffered as a result of Town & Country's discrimination. App., *infra*, 40a, 131a-133a.[6]

3. The court of appeals accepted respondents' contention that a paid union organizer is not an "employee" within the meaning of Section 2(3) of the Act, and denied enforcement of the Board's order.[7] App., *infra*, 1a-11a. The court noted that the circuits are split on whether paid union organizers are employees under the Act, with the District of Columbia, Second, and Third Circuits holding that they are, and the Fourth and Sixth Circuits holding that they are not. *Id.* at 5a-7a; see *Willmar Electric Service, Inc.* v. *NLRB*, 968 F.2d 1327, 1329-1331 (D.C. Cir. 1992), cert. denied, 113 S. Ct. 1252 (1993); *NLRB* v. *Henlopen Manufacturing Co.*, 599 F.2d 26, 30 (2d Cir. 1979); *H.B. Zachry Co.* v. *NLRB*, 886 F.2d 70, 72 (4th Cir. 1989); *NLRB* v. *Elias Brothers Big Boy, Inc.*, 327 F.2d 421, 427 (6th Cir. 1964); see also *Escada (USA) Inc.* v. *NLRB*, 970 F.2d 898 (3d Cir. 1992) (Table).

[6] The Board left to compliance proceedings the determination of how many electricians Town & Country would have hired absent its antiunion discrimination, and thus how many of the 10 applicants were actually entitled to a remedy. App., *infra*, 130a.

[7] The court of appeals did not disturb the Board's findings of fact. In the court of appeals, respondents did not contest the Board's findings that they had violated Section 8(a)(1) of the Act by interrogating job applicants about their union membership, banning union activity during nonwork time, and threatening to discharge Hansen if he did not refrain from engaging in such activity. NLRB C.A. Br. 14-15.

The court of appeals found the Fourth Circuit's reasoning in *Zachry* to be persuasive. App., *infra*, 7a. The court stated that it found the definition of "employee" in the Act to be of "little help." *Ibid.* Instead, the court looked to the common law for guidance. It noted that an individual may be "the servant of two masters at one time only if service to one does not involve abandonment of or conflict with service to the other." *Id.* at 8a (citing Restatement, *supra*, § 226, at 498). Ordinarily, a job applicant may be simultaneously loyal to his union and to his nonunion employer, the court stated. *Ibid.* But the Union's two full-time organizers "were not typical applicants," the court stated, because they already had a job and "wanted to enter Town & Country's work force not for financial gain, but to organize its workers." *Ibid.* And "[w]hen a union official applies for a position only to further the union's interests, * * * an inherent conflict of interest exists," the court reasoned, for "the union official will follow the mandates of the union, not his new employer." *Id.* at 8a-9a. For example, "[i]f the union asks him to quit working for his second employer, he will do so." *Id.* at 9a. Further, the court stated, a full-time union official "has a reduced incentive to be a good employee for his second employer," because, if terminated, "he simply returns to his full-time union job." *Ibid.*

The court of appeals further held that the unemployed electricians who belonged to the Union (including Hansen) were also not "employees" within the meaning of Section 2(3) of the Act, because they "were also under [the Union's] control." App., *infra*, 9a. The court based this conclusion on three factors. First, the unemployed union members had been encouraged by the Union to apply. *Ibid.* Second, the Union had committed to paying the difference between their salaries and union-scale wages. *Ibid.* Third and most important, the court noted that the union members in this case were subject to the Union's "job salting organizing resolution," which provided that members could work for nonunion employers "only if they work for organizational purposes," and that union members were to leave the nonunion job upon notification by the Union. *Id.* at 9a-10a. That last provision, the court stated, was "controlling," for a union's "control over a putative employee's job tenure * * * is inimical to, and inconsistent with, the employer-employee relationship." *Id.* at 10a.

REASONS FOR GRANTING THE PETITION

The Board has long held that a paid union organizer is an "employee" within the meaning of Section 2(3) of the National Labor Relations Act (Act), 29 U.S.C. 152(3), and is therefore protected against discrimination because of his union activities or affiliation. The Eighth Circuit's rejection of the Board's position deepens a conflict in the circuits on that issue, with three circuits accepting the Board's interpretation and three circuits rejecting it. The question is a recurring one that is important to the administration of the Act. In order to resolve the conflict and to reaffirm that judicial deference is owed to the Board's interpretations of the Act where, as here, its positions are rational and consistent with the statute, this Court's review is warranted.

As this Court has often explained, Congress gave the Board the "primary responsibility for developing

and applying national labor policy." *NLRB* v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786 (1990); see *Beth Israel Hosp.* v. *NLRB*, 437 U.S. 483, 500-501 (1978); *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221, 236 (1963). Where the Act does not speak directly to an issue, the Court gives "considerable deference" to the Board's interpretation and will uphold it if it is "rational and consistent with the Act," even if the Members of this Court "would have formulated a different rule had [they] sat on the Board." *Curtin Matheson*, 494 U.S. at 786-787; *NLRB* v. *United Food & Commercial Workers Union*, 484 U.S. 112, 123 (1987); *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 42 (1987); see *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Those principles apply with special force when the interpretation in question is a "consistent, longstanding interpretation of the NLRA by the Board." *NLRB* v. *Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 189-190 (1981); see also *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393, 401-402 (1983); *Bayside Enterprises, Inc.* v. *NLRB*, 429 U.S. 298, 303 (1977). In light of these principles, the court of appeals erred in rejecting the Board's statutory interpretation.

1. The Act does not expressly address whether it applies to a paid union organizer who applies for work with an employer, while retaining an affiliation with the union and intending to engage in organizational activity. But it has long been established that an applicant for work is an "employee" under the Act. See *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177 (1941). And the Act defines "employee" broadly to include "any employee," 29 U.S.C. 152(3), subject to six specific exclusions, none of which embraces a

paid union organizer who applies for a job with another employer. As this Court has observed, "[t]he breadth of § 2(3)'s definition is striking: the Act squarely applies to 'any employee[]' [and] [t]he only limitations are specific exemptions" in the statute. *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883, 891 (1984). In *Sure-Tan*, this Court held that undocumented aliens "plainly come within the broad statutory definition of 'employee'" because they "are not among the few groups of workers expressly exempted by Congress." *Id.* at 892. The Court specifically noted that "the Board's construction of th[e] term ["employee"] is entitled to considerable deference, and we will uphold any interpretation that is reasonably defensible." *Id.* at 891.[8]

This Court has indicated that common law principles inform the interpretation of the term "employee" unless Congress "clearly indicates otherwise." *Nationwide Mutual Insurance Co.* v. *Darden*, 112 S. Ct. 1344, 1349 (1992) (construing ERISA; referring to other statutes, including the Act). The common law imposes no per se prohibition against concurrent employment by two entities, such as by an employer and a union. On the contrary, as the

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[8] See also *NLRB* v. *Hearst Publications, Inc.*, 322 U.S. 111 (1944) (sustaining Board holding that newsboys who might be considered independent contractors under state law are "employees"); *Packard Motor Car Co.* v. *NLRB*, 330 U.S. 485 (1947) (sustaining Board holding, prior to the addition to the statute of language excluding "any individual employed as a supervisor," that supervisors and foremen are "employees"); *NLRB* v. *E.C. Atkins & Co.*, 331 U.S. 398 (1947) (sustaining Board holding that war-production employer's security personnel, who were required by the government to be hired as "civilian auxiliaries to the military police," are "employees").

District of Columbia Circuit has noted in holding that a paid union organizer is an "employee" within the meaning of Section 2(3) of the Act, "[u]nder common law principles '[a] person may be the servant of two masters, not joint employers, at one time as to one act, if the service to one does not involve abandonment of the service to the other.'" *Willmar Electric Service, Inc.* v. *NLRB*, 968 F.2d 1327, 1329-1330 (1992) (quoting Restatement (Second) of Agency § 226, at 498 (1958), and citing *Kelley* v. *Southern Pac. Co.*, 419 U.S. 318, 324 (1974)), cert. denied, 113 S. Ct. 1252 (1993). Thus, nothing in the text of the Act excludes paid union organizers applying for a job from the class of "employees" covered by the Act.[9]

[9] Nor, as the Board noted, is there anything in the legislative history of Section 2(3) that requires excluding a person who is actually performing work for hire for an employer from the scope of the statutory term "employee" simply because he is also a paid union organizer. App., *infra*, 24a-26a. As enacted in 1935, the structure and wording of Section 2(3) were quite similar to its current version, although with fewer express exceptions. See National Labor Relations Act, ch. 372, § 2(3), 49 Stat. 450 (1935). The history of that provision indicates that Congress used the term "employee" to embrace generally the class of "workers," "wage earners," and "workmen" who comprise the work forces of "employers." See, *e.g.*, 79 Cong. Rec. 9686 (1935) (Rep. Connery) (referring to "every man on a pay roll"), *reprinted in* II Legislative History of the National Labor Relations Act of 1935, at 3119 (1949) [hereinafter *NLRA Leg. Hist.*]; *National Labor Relations Board: Hearings on S. 1958 Before the Senate Comm. on Educ. and Labor*, 74th Cong., 1st Sess. 42 (1935) (Sen. Wagner) (referring to "the workers"), *reprinted in* I *NLRA Leg. Hist.* 1418.

Although Congress, in 1947, amended Section 2(3) to exclude certain additional categories of individuals from its coverage (see Labor Management Relations Act, 1947, ch. 120, § 101, 61 Stat. 137), it did not otherwise limit the broad scope of that provision. Indeed, in contemporaneously enacting Title III of the Labor Management Relations Act, 1947 (LMRA), 29 U.S.C. 185-187, Congress manifested an assumption that an "employee" may be employed simultaneously by a union and another entity. Although Section 302(a) of the LMRA, 29 U.S.C. 186(a), generally prohibits payments by an employer to an employee of a union, Section 302(c)(1) excepts from that ban payments made "to any * * * employee of a labor organization, who is also an employee * * * of such employer, as compensation for, or by reason of, his service as an employee of such employer." 29 U.S.C. 186(c)(1). See *Willmar Electric*, 968 F.2d at 1329. That provision thus expressly recognizes that a person can simultaneously be an "employee" of both a union and another employer.

2. The Board has determined, as an exercise of its authority to interpret the Act's provisions, that paid union organizers do come within the scope of the term "employee" as defined in the Act. That position is of long duration, see *Oak Apparel, Inc.*, 218 N.L.R.B. 701 (1975), and has been adhered to consistently. In this case and in a companion case, see *Sunland Construction Co.*, 309 N.L.R.B. 1224 (1992), the Board thoroughly reexamined the issue and reaffirmed its view that the Section 2(3) definition of "employee" covers paid union organizers.

As the Board explained in this case and in *Sunland*, affording the Act's protection to paid union organizers furthers the policies of the Act. "The right to organize is at the core of the purpose for which the statute was enacted." App., *infra*, 33a; *Sunland*, 309 N.L.R.B. at 1229; see *American Hosp. Ass'n* v. *NLRB*, 499 U.S. 606, 609 (1991). A flat rule that an employer may reject an applicant based on its hostility to that person's desire to organize the work force would be antithetical to that core purpose. App., *infra*, 34a; *Sunland*, 309 N.L.R.B. at 1229.

The Board added that protecting paid union organizers against discrimination based on their union activity does not interfere with any legitimate management right. App., *infra*, 34a (citing *Phelps Dodge*, 313 U.S. at 182); *Sunland*, 309 N.L.R.B. at 1229. The Board noted that, "[w]hile working for the employer, the paid organizer is subject to its direction and control, and is responsible for performing assigned work." App., *infra*, 34a; *Sunland*, 309 N.L.R.B. at 1229. The employer may prohibit any employee, including paid organizers, from engaging in union activity during working time, but "[o]utside work time * * * the organizer—like other workers—is free to solicit for the union." App., *infra*, 34a (citing *Republic Aviation Corp.* v. *NLRB*, 324 U.S. 793, 803 n.10 (1945)); *Sunland*, 309 N.L.R.B. at 1229. The Board, citing its experience, also rejected the argument that its position could lead to "unions packing bargaining units with their paid functionaries." App., *infra*, 36a; *Sunland*, 309 N.L.R.B. at 1229. Under Board policy, "employee status is not synonymous with voter eligibility," and paid union organizers are excluded from voting where they are "temporary" employees or where they do not share a community of interests with fellow employees. App., *infra*, 35a-36a; *Sunland*, 309 N.L.R.B. at 1229. The Board also reiterated that "employers may lawfully refuse to hire individuals seeking temporary employment, where the refusal is based on neutral hiring policies, uniformly applied." App., *infra*, 36a n.32; *Sunland*, 309 N.L.R.B. at 1229 n.33.

The Board further rejected the claim that according employee status to paid union organizers is incompatible with "the adversary relationship between employer and union." App., *infra*, 36a; *Sunland*, 309

N.L.R.B. at 1229. That argument, the Board explained, assumes that "paid union organizers will engage in union activities to the detriment of work assigned by the employer or will embark on acts inimical to the employer's legitimate interests." App., *infra*, 37a; *Sunland*, 309 N.L.R.B. at 1230. But, the Board stated,

> [t]he statute's premise is at war with the idea that loyalty to a union is incompatible with an employee's duty to the employer. The fact that paid union organizers intend to organize the employer's work force if hired establishes neither their unwillingness nor their inability to perform quality services for the employer. Indeed, because the organizers seek access to the jobsite for organizational purposes, engaging in conduct warranting discharge would be antithetical to their objective. No body of evidence has been presented that would support any generalized, or specific, finding that paid union organizers as a class have a significant, or indeed any, tendency to engage in such conduct.

App., *infra*, 37a; *Sunland*, 309 N.L.R.B. at 1230. The Board emphasized that paid union organizers are subject to the same disciplinary rules as any other employee, and therefore enjoy no "carte blanche in the workplace." App., *infra*, 38a; *Sunland*, 309 N.L.R.B. at 1230. And absent objective evidence, there is no reason for inferring that, "if hired, paid union organizers will engage in activities inimical to the employer's operations." App., *infra*, 38a; *Sunland*, 309 N.L.R.B. at 1230. Indeed, the Board noted, "a paid union organizer employee arguably poses no greater threat to an employer's property rights than a prounion employee who voluntarily engages in or-

ganizational activity." App., *infra*, 37a n.34; *Sunland*, 309 N.L.R.B. at 1230 n.35.[10]

3. In light of its careful weighing of the labor-relations interests involved, the Board's rule—that paid union organizers are covered by Section 2(3)—is certainly a rational one that is consistent with the statute. That is particularly so in light of the statute's broad definition of "employee," the comprehensiveness of which is emphasized by the very existence of the express exclusions from that definition. Accordingly, that rule is "entitled to deference from the courts." *Fall River Dyeing*, 482 U.S. at 42; *Curtin Matheson*, 494 U.S. at 796. The court of appeals, however, dismissed the broad language of the statute as being of "little help," App., *infra*, 7a, and refused to defer to the Board's resolution of the issue, or even to take into account the Board's considered appraisal of the policy interests involved. The court relied instead on its own perception of the harm to an employer of having a union organizer on his work force, in holding that such an organizer is not an "employee" protected by the Act. That holding was error.

The premise of the court of appeals' decision was that, unlike a "typical" union member who applies to

[10] The Board in *Sunland* went on to consider whether the employer's refusal to hire an organizer who applied for work during a strike of the employer by his union violated Section 8(a)(1) and (3) of the Act. The Board held that, in the strike setting, the refusal to hire was not unlawful discrimination. 309 N.L.R.B. at 1230-1231. *Sunland* thus illustrates that the Board's approach permits room for legitimate employer interests to prevail against a discrimination claim by a union organizer who applies for a job. The reasoning of the Eighth Circuit, by contrast, would resolve each and every case by denying the union organizer protection.

a nonunion employer, a paid union organizer cannot be "simultaneously loyal" to a union and to an employer, and thus is not an "employee" of that employer. App., *infra*, 8a. The court held that result to apply even to Hansen, whom respondents actually did hire. *Id.* at 9a. In the case of the unemployed union members (a group that included Hansen), the court asserted that they were under the Union's "control," and might have either participated in "an employee-initiated decision to engage in a work stoppage" at the Union's direction or resigned if directed to do so by the Union. *Id.* at 9a-10a. In the case of the two union officials, the court asserted that they would likewise have ignored the employer's mandates, might have either "increase[d] [their] organizational activities at [the] employer's expense" or quit work if directed to do so, and would have had a "reduced incentive to be * * * good employee[s]." *Id.* at 9a. Termination was a prospect that such a union official might "relish," the court stated, because it would permit the official to file an unfair labor practice charge. *Ibid.* In holding paid union organizers not to be "employees," the court thus permitted employers not to hire (and to fire) such paid union organizers solely on account of their union affiliation. The contrary result, the court suggested, would require employers "to place and retain on its payroll those whose continued presence on the job will be determined by an entity other than itself." *Id.* at 10a.

The court of appeals' analysis is flawed in four respects.

First, the court's bare assumption that paid union organizers will act in a disloyal manner toward their nonunion employers is belied by the Board's experi-

ence. The Board is aware of no evidence "that paid union organizers as a class have a significant, or indeed any, tendency to engage in * * * conduct" that is "inimical to the employer's legitimate interests." App., *infra*, 37a. Accordingly, "[t]he fact that paid union organizers intend to organize the employer's work force if hired establishes neither their unwillingness nor their inability to perform quality services for the employer." *Ibid.*

Second, in seeking to accommodate employers confronted with a genuinely disloyal employee, the court of appeals ignored the wide latitude that employers already have under the Act to respond to employee infractions and abuses. Section 8(a)(1) and (3) of the Act protects employees only from discipline based on union-related or other concerted activities. Nothing in the Act prohibits an employer with an irresponsible, underproductive, or uncooperative employee from taking appropriate disciplinary measures against that employee, including discharge, so long as those measures are neutrally imposed without regard to the employee's union affiliation or activity.

Indeed, "an employer may discharge an employee for a good reason, a poor reason or no reason at all so long as" the discharge is not motivated by unlawful considerations. *Edward G. Budd Manufacturing Co.* v. *NLRB*, 138 F.2d 86, 90-91 (3d Cir. 1943), cert. denied, 321 U.S. 778 (1944). See *Anthony Forest Products Co.*, 231 N.L.R.B. 976, 977-979 (1977) (no violation in discharge of paid union organizer for cause); *NLRB* v. *Henlopen Manufacturing Co.*, 599 F.2d 26, 29-30 (2d Cir. 1979) (same). Contrary to the court of appeals' suggestion, App., *infra*, 9a, termination of such an employee for just cause would not constitute an unfair labor practice.

But to the extent that the court of appeals viewed the increased organizational activities of a union-member employee as an instance of such misconduct, see *ibid.*, it erred. The Act protects such organizational activities so long as they are confined to non-work hours and do not otherwise interfere with production or discipline. See *Republic Aviation*, 324 U.S. at 803 n.10; *Texaco, Inc.* v. *NLRB*, 462 F.2d 812, 814 (3d Cir.) (employer may not insist that employees forgo organizational activities, or treat such activities as disloyalty), cert. denied, 409 U.S. 1008 (1972).

A third flaw in the court's holding that paid union organizers who apply to or actually work for an employer are not "employees" is its assumption that the employer otherwise would be "required" (App., *infra*, 10a) to hire such organizers without regard to their likely tenure. The court stated that, as a result of the Union's "job salting organizing resolution," an employer might be saddled with workers who would abruptly leave respondents' employ if directed to do so by the Union. *Id.* at 9a-10a.

However, as the Board has noted, an employer may validly guard against employee resignations of the sort feared by the court of appeals by refusing on a neutral basis to hire temporary workers. App., *infra*, 36a n.32. An employer may also validly ask an applicant whether there is any obstacle (including, *inter alia*, an agreement with another employer or a union) that could prevent that applicant from completing his job or serving for a given duration. The employer would be free not to hire a person so constrained, providing again that it applied this bar without regard to whether the source of the constraint was an agreement with the applicant's union. See *Willmar Electric Service, Inc.*, 303 N.L.R.B. 245, 246

n.2 (1991) ("[a]n employer may * * * lawfully refuse to hire a statutorily protected employee applicant, including a paid union organizer, on the basis of a *nondiscriminatory* policy against hiring any individual who, for example, seeks only temporary employment, applies while working for another employer, or intends to work simultaneously for more than one employer"), enforced, 968 F.2d 1327 (D.C. Cir. 1992), cert. denied, 113 S. Ct. 1252 (1993). The employer may also design its compensation scheme and other contractual terms so as to encourage longevity of employment. The need to protect employers against unsatisfactory employees, in short, may readily be met by other means short of depriving workers who are also paid union organizers of the coverage of the Act.

Finally, the decision below would create anomalies and frustrate important policies of the Act. Under that decision, a union member such as Hansen who is working for pay for an employer is not an "employee" entitled to protections against discrimination, but an as-yet unhired job applicant with no union affiliation is a statutory "employee." See *Phelps Dodge Corp.* v. *NLRB*, *supra*. To deem such an on-the-job worker not to be an "employee" confounds the common understanding of that term. See *Black's Law Dictionary* 525 (6th ed. 1990) ("employee" encompasses any "person in the service of another under any contract of hire * * * where the employer has the power or right to control and direct the employee in the material details of how the work is to be performed"). And because the sole basis for according the Act's protections to the nonunion applicant but not to the union worker is that the worker has made a commitment to attempt to organize his em-

ployer's work force and stands to receive supplemental income for doing so, the decision below is at odds with the "central purpose" of the Act—"the achievement and maintenance of workers' self-organization." *Phelps Dodge*, 313 U.S. at 193.

The decision below would have other anomalous results. A worker who has long satisfactorily performed his job may be discharged as a non-"employee" solely because the employer has learned that the worker has been engaged in paid organizational activity. Such a discharge would be inimical to "the Act's avowed purpose of encouraging and protecting the collective-bargaining process." *Sure-Tan*, 467 U.S. at 892. Indeed, in this case, respondents apparently did not even know at the time that they refused to hire the unemployed union members and at the time that Hansen was discharged that those union members and Hansen had a financial arrangement with the Union. To allow an employer successfully to interpose the defense that the employee was a paid union organizer, even if the employer has learned of that fact only after an unlawfully motivated discharge, is inconsistent with the antidiscrimination provisions of the Act. The decision below would also dictate, remarkably, that a longtime satisfactory worker would cease to become a protected "employee" within the meaning of Section 2(3) if during the course of his employment he took on the additional role of a paid union organizer—even if that added role did not adversely affect his work at all.

4. As the court of appeals acknowledged, App., *infra*, 5a-7a, the decision below conflicts with the decision of the District of Columbia Circuit in *Willmar Electric Service, Inc.* v. *NLRB*, *supra*, the decision of the Second Circuit in *NLRB* v. *Henlopen Manu-*

facturing Co., *supra*, and the decision of the Board that was enforced by the Third Circuit in *Escada (USA) Inc.* v. *NLRB*, 970 F.2d 898 (3d Cir. 1992) (Table).[11]

a. In *Willmar Electric*, a union's field organizer applied for work as an electrician. He advised the employer that he intended to remain a union official and, during breaks and after hours, to attempt to organize the work force. He stated that he would "probably" stop receiving money from the union during his employment. The company did not hire him. An official explained that "it's kind of hard to hire you when you're out there on the other side, picketing." 968 F.2d at 1328.

Upholding findings of violations of Section 8(a)(1) and (3), the District of Columbia Circuit held that the Board had "reasonably determine[d] that [a person] who is employed simultaneously by a union and a company is an 'employee' under § 2(3) of the Act." 968 F.2d at 1330-1331. Congress, the court determined, had not "clearly resolved the issue" of whether the term "employee" in the Act encompasses paid union organizers. *Id.* at 1329 (citing *Chevron*, 467 U.S. at 842-843). But it was "plain" that the word "employee" did not exclude concurrent employment generally, and "[o]nce that (obvious)

[11] As the court of appeals also noted (App., *infra*, 5a-6a), its decision is in accord with decisions of the Fourth and Sixth Circuits. See *H.B. Zachry Co.* v. *NLRB*, 886 F.2d 70 (4th Cir. 1989); *NLRB* v. *Elias Brothers Big Boy, Inc.*, 327 F.2d 421 (6th Cir. 1964). The Fourth Circuit has recently reaffirmed its holding in *Zachry*. See *Ultrasystems Western Constructors, Inc.* v. *NLRB*, 18 F.3d 251, 254 (1994) (paid union organizer is "not a bona fide applicant for employment within the meaning of the NLRA").

step is taken, it is hard to see how one could exclude employment by a union as well as another employer except on grounds either of some implication from the structure of the Act or some powerful legislative history." *Ibid.* The court found no such evidence. On the contrary, it noted that under common law an employee could work for two masters so long as "the service to one does not involve abandonment of the service to the other." *Id.* at 1329-1330 (quoting Restatement, *supra*, § 226, at 498). And "[u]ntil such time as an employee 'abandons' the nonunion employer for the union employer, it is hard to see why he should be denied the protection of the Act." *Id.* at 1330.

The District of Columbia Circuit also rejected the central premise underlying both the decision below and the Fourth Circuit's decision in *H.B. Zachry Co.* v. *NLRB*, 886 F.2d 70 (1989), on which the court below relied: that hiring a union organizer "would subject [the employer] to intolerable risks of disloyalty." 968 F.2d at 1330 (citing *Zachry*, 886 F.2d at 73). The court noted that the "risk of disloyalty is surely not to be discounted," and that an employer may discipline or discharge an employee "for disloyalty," *ibid.* (citing *George A. Hormel & Co.* v. *NLRB*, 962 F.2d 1061, 1064 (D.C. Cir. 1992)), much as it could "for arson." *Ibid.* But, the court explained, the employer may not discharge such a person "by saying that arsonists are not 'employees'; it must prove that it would have fired the arsonist even if he hadn't been engaged in union-related activities." *Ibid.*

The Eighth Circuit's acknowledged disagreement with *Willmar Electric* is evident at every stage of analysis. While *Willmar Electric* found that the im-

plications of the statutory language as amplified by the common law made it "hard to see why [the union organizer] should be denied the protection of the Act," 968 F.2d at 1330, the Eighth Circuit found the statute to be of "little help," App., *infra*, 7a. Further, whereas *Willmar Electric* found a union organizer's joint employment insufficient to constitute "abandonment" under the common law, 968 F.2d at 1330, the Eighth Circuit found an "inherent conflict of interest," App., *infra*, 8a-9a. Finally, while the District of Columbia Circuit deferred under *Chevron* to the Board's determination that holding a union organizer an "employee" would not impair labor-management relations, the Eighth Circuit ignored the Board's analysis altogether and substituted its own appraisal of the impact in the workplace of such a holding. *Id.* at 8a-10a. The Eighth Circuit's approach therefore cannot be reconciled with the approach taken by either the Board or the District of Columbia Circuit.

b. In *Henlopen*, an applicant sought employment at a cosmetics-supply company without disclosing that she was a union organizer and was being paid $50 a week by the union to organize the employer and to report information back to the union. 599 F.2d at 27-28. The employee was hired and later fired. The Second Circuit overturned the Board's findings of violations of Section 8(a)(1) and (3), because insufficient evidence of discriminatory conduct existed. 599 F.2d at 29-30. But in so doing, the court also rejected the company's claim that " 'a paid union infiltrator' is not a *bona fide* employee under the Act." *Id.* at 30. The court based its dictum on the Board's rulings that paid union organizers are in fact "employees" within the meaning of

Section 2(3) of the Act. *Ibid.* (citing *Anthony Forest Products Co.*, 231 N.L.R.B. 976 (1977); *Oak Apparel, Inc.*, 218 N.L.R.B. 701 (1975); *Dee Knitting Mills*, 214 N.L.R.B. 1041 (1974), enforced mem., 538 F.2d 312 (2d Cir. 1975) (Table) (No. 75-4016)).

c. In *Escada*, the Third Circuit summarily enforced an order of the Board finding the discharge of a paid union organizer to have been discriminatory. See 970 F.2d 898 (3d Cir. 1992), enforcing 304 N.L.R.B. 845 (1991). The Board there declined the invitation of the company and a dissenting Board member to adopt, based on the Fourth Circuit's decision in *Zachry*, a reading of Section 2(3) under which union employees would not be considered "employees" within the meaning of the Act. See 304 N.L.R.B. at 845, 846.[12]

d. While factual differences exist among the cases decided in the courts of appeals, as we read these cases, those differences were not decisive. Instead, each court, like the Board, adopted a broader rationale that paid union organizers as a rule either are, or are not, "employees" within the meaning of Section 2(3) of the Act.[13] Moreover, to the extent that

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[12] That dissenting Board member (Oviatt) later reconsidered his position in *Zachry*, and concurred in the Board's decision in the instant case. App., *infra*, 41a; see *Sunland*, 309 N.L.R.B. at 1231.

[13] The "job salting organizing resolution" in this case, for example, is a factor present in no other decided case. The court of appeals cited that resolution as a "controlling" factor in the aspect of its decision holding that the unemployed union members were not "employees." App., *infra*, 10a. But it is apparent from the court's opinion that the Eighth Circuit would have reached the same result absent this resolu-

factual distinctions among paid union organizers may be seen as germane, this case involves union organizers in the varied contexts of a full-time union official, a member who is applying for a job, and a member (Hansen) actually hired by the employer. The existence of multiple fact patterns may assist the Court to resolve the issue in a conclusive manner that provides maximum guidance to the courts of appeals.

The discord in the circuits on the issue of whether a paid union organizer is an "employee" within the meaning of Section 2(3) of the Act is likely to persist absent this Court's intervention. The Board has already reexamined its position on that issue in light of an adverse decision (the Fourth Circuit's decision in *Zachry*). In this case and in a companion case, the Board reaffirmed its position. Thus, to the extent that the circuits have deferred to the Board's inter-

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tion, for two reasons. First, the court endorsed the Fourth Circuit's reasoning in *Zachry*, a case that involved no such resolution. *Id.* at 7a. Second, in the aspect of its decision holding that the two union organizers were not "employees," the court did not indicate that it was relying on the resolution. *Id.* at 8a-9a. Indeed, the resolution did no more than put in writing the situation that generally exists for union members who work for nonunion employers. Union constitutions or bylaws, as in this case, see *id.* at 46a-47a, 62a, often call for disciplining or expelling members who work at nonunion jobs without the permission of the union. Thus, whether or not a resolution exists requiring a union member to leave a nonunion job upon the union's demand, a member whose union withdraws approval of his nonunion work will always have an economic incentive to leave that job, for if he does not leave that job, he may face a fine or loss of union benefits. Moreover, whether or not a resolution exists, the union member (such as the workers in this case who were unemployed prior to taking the nonunion job) is also free to conclude that it is worth his while to spurn the union's demand.

pretation of the term "employee," that interpretation is not likely to change. There is also no reason to believe that the circuits will gravitate towards a common position in light of the reasoning of sister circuits. It was after *Zachry* that the District of Columbia Circuit (in *Willmar Electric*) and the Third Circuit (in *Escada*) accepted the Board's view that paid union organizers are "employees," and it was after *Willmar Electric* and *Escada* that the court below adopted *Zachry*'s opposite view. The Fourth Circuit has recently reaffirmed its position in *Zachry*. See note 11, *supra*. The same issue is also presented in two other cases pending in the courts of appeals. See *Tualatin Electric, Inc.* v. *NLRB*, No. 93-70775 (9th Cir.); *Mathis Electric Co.* v. *NLRB*, No. 94-1948 (4th Cir.). The Board has advised us that the same issue is presented in more than 70 unfair labor practice cases presently pending before it.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FREDERICK L. FEINSTEIN
General Counsel

LAWRENCE G. WALLACE
Deputy Solicitor General

LINDA SHER
Acting Associate General Counsel

PAUL A. ENGELMAYER
Assistant to the Solicitor General

NORTON J. COME
Deputy Associate General Counsel

PETER WINKLER
Attorney
National Labor Relations Board

NOVEMBER 1994

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 92-3911

TOWN & COUNTRY ELECTRIC, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 292, INTERVENOR/RESPONDENT

No. 93-1218

TOWN & COUNTRY ELECTRIC, INC.; AMERISTAFF PERSONNEL CONTRACTORS, LTD., RESPONDENTS

v.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 292, INTERVENOR/PETITIONER

Petition for Review of an Order of the National Labor Relations Board

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Submitted: October 11, 1993

Filed: August 31, 1994

Before RICHARD S. ARNOLD, Chief Judge, WOLLMAN and LOKEN, Circuit Judges.

WOLLMAN, Circuit Judge.

The National Labor Relations Board found that Town & Country Electric, Inc. had violated sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act (the "Act"), 28 U.S.C. §§ 158(a)(1) & (3), by discriminating against two full-time union organizers and nine other union members. Town & Country petitions for review of the Board's decision and order, and the Board cross petitions for enforcement of its order. Because we find that the union organizers and the other union members were not "employees" within the meaning of section 2(3) of the Act, 29 U.S.C. § 152(3), and therefore not entitled to the Act's protection, we deny enforcement of the order.

I.

In early September 1989, Town & Country, a large nonunion electrical contractor from Appleton, Wisconsin, obtained a contract to do electrical work at Boise Cascade's paper mill in International Falls, Minnesota. After being awarded the contract, Town & Country learned that Minnesota law requires electrical contractors to employ one electrician licensed by the State of Minnesota for every two unlicensed electricians working at a job site in the state. None of Town & Country's electricians had a Minnesota license. To help it recruit Minnesota-licensed electricians, Town & Country retained Ameristaff Personnel Contractors, Ltd., a temporary employment agency from Green Bay, Wisconsin. Ameristaff advertised in a Minneapolis newspaper for licensed journeymen electricians. Ameristaff prescreened those who responded to the advertisement and scheduled interviews for seven applicants at a Minneapolis hotel on September 7.

Ron Sager, Town & Country's human resources manager, Dennis Defferding, one of its project managers, and Steven Buelow, Ameristaff's president, flew from Appleton to Minneapolis to conduct the interviews. Due to inclement weather, they arrived at the hotel one and one-half hours late. Of the seven applicants with scheduled interviews, only one, Gary Weseman, was present. Also present for interviews, however, were approximately one dozen members of Local 292 of the International Brotherhood of Electrical Workers, including two full-time paid union officials. Officials of Local 292 had learned of the job advertisement and had encouraged union members to respond and, if hired, to organize the job site.

Sager and Defferding interviewed union member Craig Jones first because he said that he had to leave early. They then interviewed Weseman and offered him a job. Following these two interviews, Buelow informed Sager that none of the remaining applicants had prescheduled interviews and that from their applications they appeared to be union members. Sager then informed the applicants that he had decided to interview only applicants who had scheduled interviews because he had to return to Appleton to attend an important meeting that afternoon. When Sager asked all those without appointments to leave, Malcolm Hansen protested that he had called Ameristaff's office earlier that day and had been told to report to the hotel for an interview. After Buelow

had called his office and confirmed that Hansen had indeed called Ameristaff after they had left for Minneapolis, Sager interviewed Hansen. Sager hired Hansen, knowing that he was a union member. Although interviewed and selected by Town & Country, Hansen was technically employed by Ameristaff as a temporary employee for referral to Town & Country.

On September 12, Town & Country's crew, including Hansen, began work at Boise Cascade's mill. At the job site, Hansen announced to the crew that he was there to organize for the union. Hansen talked continuously to his coworkers about the benefits of the union and relentlessly solicited them to sign with the union, even though they indicated that they were not interested. Hansen's crewmates complained to their foreman about Hansen's nonstop talking as well as his poor workmanship and low productivity.

After the crew had begun work at the job site, Sager learned that under Minnesota law an electrical contractor could not use temporary employees from an employment agency; rather, all employees had to be directly employed by the contractor itself. Sager informed Buelow about this law and about Hansen's low productivity and poor workmanship; Buelow then discharged Hansen on September 14. Hansen asked Sager if Town & Country would hire him directly, but Sager refused to do so.

Affirming the Administrative Law Judge's decision, the Board found that Town & Country had violated sections 8(a)(1) and 8(a)(3) of the Act by refusing to interview two union officials and eight other union members because of their union affiliation and by refusing to retain Hansen because of his union activity at the job site. *Town & Country Elec., Inc.*, 309 N.L.R.B. 1250 (1992). In so holding, the Board found that the two union organizers and the other union members, including Hansen, were employees within the meaning of section 2(3) of the Act. In its petition, Town & Country argues that this finding was improper.

II.

The Act "confers rights only on *employees*, not on unions or their nonemployee organizers." *Lechmere, Inc. v. NLRB*, 112 S. Ct. 841, 845 (1992). Applicants for employment, however, have long been considered to be employees under the Act. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 181-88 (1941). Although the task of defining the term "employee" has been assigned primarily to the Board as the agency created by Congress to administer the Act, *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (citing *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 130 (1944)), the Board's construction of the term is not immune from judicial review, *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 166 (1971). We will uphold the Board's interpretation only if it is reasonable. *Sure-Tan*, 467 U.S. at 891; *Pittsburgh Plate Glass*, 404 U.S. at 166.

In this case, we must decide whether two separate but related classes of individuals were employees within the meaning of the Act. We first consider whether the two full-time union organizers were statutory employees and then decide the same issue for the other nine union members, including Hansen.

A.

The circuits are split on whether paid union organizers are employees under the Act. In *H.B. Zachry*

Co. v. NLRB, 886 F.2d 70, 72 (4th Cir. 1989), the Fourth Circuit, joining the Sixth Circuit, *NLRB v. Elias Brothers Big Boy, Inc.*, 327 F.2d 421, 427 (6th Cir. 1964), held that a union organizer is not a bona fide employee within the meaning of section 2(3). Zachry had refused to hire a paid full-time union organizer who had applied for work, upon the union's instruction, to organize Zachry's employees. Had the organizer been hired, he would have remained concurrently employed and supervised by the union. The union would have made up any shortfall in his salary, continued to make payments for his fringe benefits, and paid for his travel expenses and any other living expenses related to the job. In reaching its holding, the court stated that the "plain meaning of the term 'employee' contemplates an employee working under the direction of a single employer. The term plainly does not contemplate someone working for two different employers at the same time and for the same working hours." *Zachry*, 886 F.2d at 73.

On the other hand, in *Willmar Electric Service, Inc. v. NLRB*, 968 F.2d 1327, 1329-31 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 1252 (1993), the D.C. Circuit, agreeing with the Second Circuit, *NLRB v. Henlopen Manufacturing Co.*, 599 F.2d 26, 30 (2d Cir. 1979), reached a contrary decision. *See also Escada (USA) Inc. v. NLRB*, 970 F.2d 898 (3d Cir. 1992) (enforcing the Board's order without an opinion). Willmar had refused to hire a job applicant who was employed by a union when he applied, sought the job for the purpose of organizing Willmar's work force, planned to retain an employment relationship with the union, and planned to return to being a full-time union employee. Rejecting

Zachry's holding, the court held that the Board could reasonably determine that an individual "who is employed simultaneously by a union and a company is an 'employee'" under section 2(3). *Willmar*, 968 F.2d at 1330-31.

The Fourth Circuit has recently adhered to its decision in *Zachry*, expressly declining to revisit it in the light of *Willmar*. *Ultrasystems Western Constructors, Inc. v. NLRB*, 18 F.3d 251, 255 (4th Cir. 1994).

We find *Zachry* to be more persuasive than *Willmar*. Section 2(3)'s definition of "employee,"[1] provides little help in deciding the issue before us. *See Nationwide Mutual Ins. Co. v. Darden*, 112 S. Ct. 1344, 1349 (1992); *Zachry*, 886 F.2d at 72. Section 2(3) merely defines employee to mean "any employee" and outlines several types of employment not covered by the statute. When a federal statute does not helpfully define the term "employee," we infer

[1] Section 2(3) provides in full: The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined. 29 U.S.C. § 152(3).

that " 'Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine.' " *Darden*, 112 S. Ct. at 1348 (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 740 (1989)).

Under common law, an agent has a duty to act solely for the benefit of his principal in all matters connected with his agency. Restatement (Second) of Agency § 387 (1957). More specifically, an agent is subject to a duty not to act on behalf of a person or entity whose interests conflict with those of the principal in matters in which the agent is employed. *Id.* § 394. Pursuant to this obligation, a person may be the servant of two masters at one time only if service to one does not involve abandonment of or conflict with service to the other. *Id.* § 226. Ordinarily, however, the control a master can properly exercise over the conduct of a servant prevents simultaneous service for two independent employers. *Id.* cmt a.

The Board argues that working simultaneously for the union as a paid organizer and for a nonunion employer does not involve a conflict of interest. The Board contends that the Act is founded on a belief that an employee may legitimately give allegiance to both a union and an employer.

Were this a case involving a typical job applicant, we might well agree that an employee may be simultaneously loyal to his union and to his nonunion employer. The two union organizers, however, were not typical applicants. They were not in search of a job; they already had one. The organizers wanted to enter Town & Country's work force not for financial gain, but to organize its workers. When a union official applies for a position only to further the union's interests, we believe that an inherent conflict of interest exists. In this situation, the union official will follow the mandates of the union, not his new employer. If the union commands him to increase his organizational activities at his second employer's expense, he will do so. If the union asks him to quit working for his second employer, he will do so. Additionally, a union organizer in this position has a reduced incentive to be a good employee for his second employer. If he is terminated, he simply returns to his full-time union job. Indeed, he may even relish being discharged, because he then can file an unfair labor practice charge, claiming that he was terminated because of his organizing efforts. Accordingly, we find that the two full-time paid union organizers were not employees under the Act.

B.

We further find that the union members who applied, including Hansen, were not employees entitled to the Act's protection. Like the union organizers, these applicants were also under Local 292's control. Although not full-time organizers, they were encouraged by Local 292 to apply and to organize Town & Country's employees if hired. The union would pay those hired the difference between union scale and Town & Country's wages as well as their travel expenses.[2] Most important, these applicants were subject to Local 292's job salting organizing resolution. Pursuant to this resolution, Local 292 members

[2] Indeed, for Hansen's organizational efforts at the Boise Cascade job site, he received almost $1100 from the union, as compared to $725 from Ameristaff.

may work for nonunion employers only if they work for organizational purposes. In particular, the resolution provides that the union's business manager is "empowered to authorize members to seek employment by nonsignatory contractors for the purpose of organizing the unorganized." The resolution further provides that "such members, when employed by nonsignatory employers, shall promptly and diligently carry out their organizing assignments, and leave the employer or job immediately upon notification." We find this last provision controlling, for third-party control over a putative employee's job tenure, in contrast to, say, an employee-initiated decision to engage in a work stoppage, is inimical to, and inconsistent with, the employer-employee relationship. Fidelity to the principles and goals of one's chosen labor organization is to be expected and is of course protected by the Act. On the other hand, traditional common-law principles governing the establishment of the employer-employee relationship should not be jettisoned in an effort to broaden the protections of the Act beyond those which it was intended to provide. Town & Country may not deny employment to those who, in addition to performing the work they were employed to do, zealously seek to persuade their fellow employees to join their union, but it should not be required to place and retain on its payroll those whose continued presence on the job will be determined by an entity other than itself. Accordingly, we hold that Town & Country committed no unfair labor practice in refusing to interview the two union organizers and the other union members.

Having found that none of the alleged discriminatees were employees under the Act and that therefore no violations of the Act occurred, we need not consider Town & Country's remaining two arguments: that the Board improperly approved the ALJ's use of an irrebuttable presumption that all nonunion employers are unlawfully motivated to discriminate against individuals who are affiliated with a union, and that the Board failed to follow precedent that permits employers to prohibit solicitation during work time.

Enforcement of the order is denied.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX B

BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Cases 18-CA-11035, 18-CA-11044, and 18-CA-11080

TOWN & COUNTRY ELECTRIC, INC. and
AMERISTAFF PERSONNEL CONTRACTORS, LTD.
and CHARLES EVANS

TOWN & COUNTRY ELECTRIC, INC. and
AMERISTAFF PERSONNEL CONTRACTORS, LTD.
and INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 292, AFL-CIO

TOWN & COUNTRY ELECTRIC, INC. *and*
INTERNATIONAL BROTHERHOOD OF ELECTRICAL
WORKERS, LOCAL UNION 343, AFL-CIO

December 16, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY, OVIATT, AND RAUDABAUGH

On September 18, 1990, Administrative Law Judge Joel A. Harmatz issued the attached decision. Respondent Town & Country Electric filed exceptions and a supporting brief; the General Counsel filed cross-exceptions, a supporting brief, and an answering brief to the Respondent's cross-exceptions; and Respondent Town & Country Electric filed an answering brief to the General Counsel's cross-exceptions.

On January 22, 1992, the Board scheduled oral argument because this case raised important 8(a)(3) and (1) issues with respect to whether paid union organizers are "employees" within the meaning of the Act, if so, whether it violates the Act to refuse to hire a paid organizer.[1] Thereafter, the Respondent, the General Counsel, and the Charging Party Union, and, as amici curiae, the American Federation of Labor and Congress of Industrial Organizations and its Building and Construction Trades Department, AFL-CIO, the Chamber of Commerce of the United States of America, the Associated General Contractors of America, Inc., and the Associated Builders and Contractors Inc., presented oral argument before the Board. The Respondent and the amici also filed briefs.[2]

The Board has considered the decision and the record in light of the exceptions, briefs, and oral argument, and has decided to affirm the judge's rulings, findings,[3] and conclusions and to adopt the rec-

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[1] Oral argument additionally was held in *Sunland Construction Co.*, Cases 15-CA-10618-1 et al. and *Sunland Construction Co.*, Cases 15-CA-10927-2 et al.

[2] The Chamber of Commerce did not file a brief. Subsequently, the AFL-CIO submitted a letter citing a recently issued relevant court decision.

[3] Respondent Town & Country Electric has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188

ommended Order as modified below.[4]

For the reasons discussed below, we find that paid union organizers Michael Priem and Greg Shafranski, as well as nine other union members who sought employment with the Respondent,[5] are "employees" within the meaning of the Act. Thus, we agree with the judge that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to interview and consider for employment Priem, Shafranski, and eight other union members because of their union affiliation and by discharging employee Malcolm Hansen because of his union activities.[6]

F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Respondent Town & Country Electric further contended that the judge was biased in that he prejudged the issues before him. Based on our review of the entire record, including the judge's decision, we conclude that the Respondent's contentions are without merit.

[4] Although he found that Respondent Ameristaff Personnel Contractors, Ltd. coercively interrogated an applicant for employment, the judge concluded that the violation was adequately remedied by his recommended Order regarding Ameristaff's principal. Respondent Town & Country, which he found also violated Sec. 8(a)(1) of the Act by this conduct. We find merit in the General Counsel's exception to the judge's failure to require that Respondent Ameristaff, which was acting as the agent for Respondent Town & Country in the procurement of employees, also cease and desist from interrogating employees in violation of the Act. Accordingly, we shall order Respondent Ameristaff to cease and desist from such conduct and to post an appropriate notice.

[5] The Union offered to pay these members the difference between union scale and the Respondent's wages and benefits if they would attempt to organize the Respondent's nonunion employees.

[6] In adopting the judge's finding that Respondent Town & Country Electric violated Sec. 8(a)(3) of the Act by refusing

I. BACKGROUND

A. *Facts*

Town & Country Electric, Inc. (Town & Country) is the largest nonunion electrical contractor in the State of Wisconsin. In early September 1989,[7] Boise Cascade awarded Town & Country a contract to perform electrical renovation work at Boise's facility in International Falls, Minnesota. Town & Country was to begin work on September 11. There is a Minnesota statutory requirement that an electrical contractor employ one electrician licensed by the State for every two unlicensed electricians engaged in such work on the jobsite. Town & Country did not have a single electrician licensed in Minnesota at the time Boise Cascade awarded it the contract.

To obtain electricians licensed in Minnesota, Town & Country retained Ameristaff, a temporary employment agency based in Minneapolis, for recruitment purposes. Under this arrangement, Ameristaff was responsible for advertising job opportunities related to the Boise-Cascade operation and assumed liability for fringe benefits earned by employees on its payroll who worked there. Town & Country, however, retained exclusive discretion regarding interviewing, hiring, the setting of wage rates and granting of increases, supervising and the discharge of employees on the Boise-Cascade project. The judge found, and we agree, that Town & Country exercised plenary

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to retain employee Malcolm Hansen, we stress the evidence here that, as the judge found, the pivotal event leading to Town & Country's decision was Hansen's protected concerted activity in seeking to organize the unit employees during their lunch break on September 14, 1987.

[7] All dates are in 1989 unless otherwise noted.

authority and control over employees retained by Ameristaff for its account and that, even absent a joint-employer relationship, Ameristaff was an agent whose conduct in connection with hiring for the Boise project was binding on Town & Country.

On September 3, Ameristaff ran an advertisement in a major Minneapolis newspaper announcing employment opportunities for "licensed journeymen electricians" and including its telephone number. Ron Sager, Town and Country's manager of human resources, made it clear to Ameristaff before the advertisement was placed that job applicants had to be "able to work a merit [nonunion] shop." When applicants responded to the advertisement, Ameristaff's receptionist, Lorrie Ann O'Mellan, asked them whether they preferred to work union or nonunion and, if the job seeker had worked only union projects, whether the person would work nonunion.[8] Steven Buelow, Ameristaff's president, arranged for Town & Country to interview applicants at the Embassy Suites in Minneapolis on September 7.

Members and officials of International Brotherhood of Electrical Workers, Locals 292 and 343, learned of Ameristaff's job advertisements. The Unions, which had authorized their members to work nonunion for organizational purposes, encouraged unemployed members to apply and, if hired, to organize the jobsite. There was a fund the Unions had established to reimburse members for wage, travel, and health benefit differentials they incurred on nonunion jobs.

[8] The General Counsel did not allege that O'Mellan's questioning of the phone applicants violated Sec. 8(a)(1) of the Act.

On September 7, Sager and Dennis Defferding, the Respondent's project manager, traveled from Appleton, Wisconsin to Minneapolis to conduct job interviews for the Boise-Cascade project. They did not arrive at the Embassy Suites until about 11 a.m. because their flight had been delayed for several hours by adverse weather conditions. When they arrived, there were about a dozen unemployed members of IBEW Local 292, including Priem and Shafranski, waiting to interview. None had previously scheduled interviews, except for Malcolm Hansen who had called Ameristaff that morning and was told by O'Mellan to report for an interview at the Embassy Suites. The only other applicant appearing for an interview, Gary Weseman, was not a union member and had previously scheduled an interview through Ameristaff. Buelow distributed applications, under the Ameristaff logo, to all the applicants.

Town & Country began the interviews with Craig Jones, a union member who had no appointment, apparently because Jones said that he had to leave soon to care for his children. During the interview, Jones characterized Town and Country's starting rate of $15 per hour as an insult. Jones also told the Town & Country representatives that he would have to discuss out-of-town work with his wife. Town & Country told Jones that it would keep his application on file. There was no further contact between Jones and Town & Country representatives.[9] Town & Country

[9] We adopt the judge's finding that the Respondent did not violate Sec. 8(a)(3) by refusing to consider Jones for employment, or another union member, Roger Chartrand, who arrived at the Embassy Suites as the Respondent's representatives were departing.

next interviewed Gary Weseman but did not hire him.[10]

Meanwhile, Buelow informed the remaining applicants that the job was nonunion. The union members responded that they were interested in any work available. Buelow left the room and, about 15 minutes later, returned and read off a list of seven names. None were present. After identifying that group of names as those applicants with prearranged appointments, Buelow said that he did not know if anyone without an appointment would be interviewed. Priem, one of the two paid union organizers, told Buelow that there were at least eight licensed journeymen present who could take the place of those applicants who had failed to appear.

After Town & Country interviewed Jones and Weseman, Buelow reported to Sager that none of the other applicants had appointments. Sager expressed curiosity as to how those applicants without appointments had known about the interviews. Buelow at some point showed him several of the applications and commented, "I think they're union." Sager decided to cancel further interviews and return to Appleton purportedly because his attendance was required for a manpower meeting at 3:30 that afternoon. Yet, Sager admitted that he had previously learned, on September 5, of the licensed journeyman/helper ratio that Minnesota law requires. It is undisputed that Town & Country employed no electricians licensed in Minnesota at the time Sager decided to return to Appleton.

When Sager announced to the remaining applicants that he would conduct no further interviews, Hansen

[10] The General Counsel did not allege that Town & Country's failure to hire Weseman constituted a violation.

protested that he had called the number in the newspaper advertisement and was told to "show up." Hansen announced that he would not leave until Sager interviewed him. After threatening to call local authorities and have the union members removed from the hotel room, Sager said that he would check about Hansen's situation and "honor the commitment" if Hansen had made an appointment. Buelow confirmed that Hansen had called Ameristaff so Sager interviewed him. Sager then announced to the other applicants that he would not interview anybody else.

Town & Country conducted several interviews with Hansen before deciding to hire him. On September 14, 2 days after Hansen began work, the Respondent discharged Hansen because, as the judge found, he attempted to organize the Respondent's nonunion employees working at the jobsite.

B. *Judge's Findings*

The judge found that, considering Town & Country's dire need at the time for electricians who were licensed in Minnesota and the evidence that Town & Country aborted the Embassy Suites interviews immediately after learning of the remaining applicants' union affiliation, the General Counsel established a prima facie case that Town & Country had discriminatorily refused to consider these applicants for hire notwithstanding its subsequent hire of Hansen.

In considering Town & Country's defenses, the judge rejected its contention that Sager did not want to interview anyone whom Ameristaff had not prescreened. The judge stressed that Town & Country had interviewed Jones without this condition being met and that Sager, who should have known that

Ameristaff had screened only seven applicants, expressed pleasure on arriving at the Embassy Suites and observing that the turnout was larger than anticipated. The judge found it incomprehensible that, given Sager's purported urgency about attending the manpower meeting later that day, Sager made no effort on his arrival at the Embassy Suites to monitor the interviewing process so as to best utilize the limited time he claimed was available for the interviews. For these reasons, the judge found that, except for Jones and Chartrand, discussed supra, Town & Country violated Section 8(a)(3) by failing to demonstrate that it would not have interviewed and considered for hire those named in the complaint in the absence of their union affiliation.

Regarding Hansen's discharge, the judge concluded that Town & Country had failed to substantiate by credible evidence that it would have discharged Hansen even in the absence of his organizational activity. The judge distinguished the Fourth Circuit's decision in *H. B. Zachry Co. v. NLRB*, 886 F.2d 70 (1989), denying enf. to 289 NLRB 838 (1988), discussed infra, from the present case because, in his view, the evidence showing that the Union planned to reimburse Hansen for any wage and benefit losses he incurred on the nonunion job did not warrant a finding that Hansen was a paid union organizer.

C. *Exceptions*

Based on the court's decision in *Zachry*, supra, the Respondent argues in its exceptions that the discriminatees were not bona fide applicants under the statute. The Respondent notes that Priem and Shafranski were full-time salaried business representatives and that the Union paid Hansen full journeyman's scale, in addition to the pay he received from Ameristaff, for the 31 hours that he worked at the Respondent's jobsite. The Respondent claims that the Union's payments to Hansen put him in the same category as full-time salaried business agents whom the court excluded from the definition of employee under Section 2(3). Regarding the rest of the alleged discriminatees, the Respondent argues that no violation occurred when it rejected their applications because, if they had been hired, the Union's "salting resolution" would have paid them the difference between the Respondent's wages and union scale and thus disqualified them under *Zachry*.

The Respondent also contends that the alleged discriminatees did not qualify as statutory employees because their first obligation under the salting resolution was to fulfill the Union's organizing purpose. The Respondent asserts that it was the Union which was the discriminatees' employer in the circumstances here. According to the Respondent, these union members would only work for it under the Union's direction and, in the process, they would interfere with the self-determination rights of its other employees. Further, because the salting resolution required members to leave the nonunion jobsite once organizing had ceased, the Respondent argues that none of the alleged discriminatees met the statutory definition of employee because they were not seeking permanent employment. Thus, for the above reasons, the Respondent urges the Board to find that the applicants for employment whom it rejected and Hansen were not employees under Section 2(3) of the Act.

II. ANALYSIS

A. *Overview*

We agree, for the reasons stated by the judge, that the Respondent violated Section 8(a)(3) and (1) by refusing to hire Priem, Shafranski, and eight other union members who applied for work and by later discharging employee Malcolm Hansen because of his union activities. Additionally, in finding these 8(a)(3) violations, we specifically affirm the judge's findings that Hansen, as well as the discriminatees that Town & Country rejected for employment because of their union affiliation, are statutory employees for the reasons fully discussed below.

B. *Paid Union Organizers as "Employees" Within the Meaning of Section 2(3)*

1. The definition of "employee"

We begin our analysis recognizing that applicants are "employees." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941). As applicants are "employees," the question is whether paid union organizer applicants are employees.

Congress, in 1935, broadly defined "employee" in Section 2(3), providing that:

> The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment

The word "employee" both in common usage and in the law ordinarily includes individuals concurrently working for different employers. "Employee" commonly refers to individuals "employed by another," "under wages or salary,"[11] without reference to any requirement that they be employed by only a single employer. Similarly, a standard legal definition of "employee" encompasses any "person in the service of another under any contract of hire, express or implied, oral or written, where the employer has the power or right to control the employee in the material details of how the work is to be performed," without reference to, or proscription of, dual employment. *Black's Law Dictionary* 471 (rev. 5th ed. 1979). As long as union organizers employed by or seeking work with an employer do so for wages in return for assigned work, they meet the standard dictionary definition of "employee." Giving Section 2(3), as amended, its "ordinary meaning,"[12] we find that the definition of "employee" as "any employee" is sufficiently expansive to encompass paid union organizers.

2. Exclusions

Next we look to the exclusions in Section 2(3). Congress in 1935 excluded specific categories from its broad definition of "employee," i.e., agricultural laborers and individuals performing domestic service in

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[11] *Websters Third New International Dictionary*, 743 (rev. 1971). See also *Funk & Wagnalls Standard College Dictionary*, 433 (1973), which defines "employee" as "one who works for another in return for salary, wages, or other consideration."

[12] We assume that the statutory purpose is expressed by the ordinary meaning of its words. *INS v. Phinpathya*, 464 U.S. 183, 189 (1984).

the home. In 1947, Congress added to the exclusions so that the 2(3) definition of "employee" now excludes:

> any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

"Paid union organizers" do not appear in these exclusions. Under the well-settled principle of statutory construction—expressio unius est exclusio alterius—only these enumerated classifications are excluded from the definition of "employee."[13] Accordingly, full-time, paid union organizers are "employees" within the ordinary meaning of this provision. See generally *State Bank of India v. NLRB*, 808 F.2d 526, 531-532 (7th Cir. 1986), cert. denied 483 U.S. 1005 (1987).

3. Legislative History

We must also look to the legislative history, however, because a statute will not be given its ordinary meaning if there is "a clearly expressed legislative intention to the contrary." *Consumer Product Safety Commission v. GTE Sylvania*, 447 U.S. 102, 108 (1980). There is no evidence in the legislative history

[13] 2A Singer, *Sutherland Statutory Construction*, Sec. 47.23 (4th ed. 1973) (Suppl. 1991).

that Congress intended Section 2(3), at least as to paid union organizers, to be more restrictive than the ordinary meaning of its terms.[14] On the contrary, the legislative history reflects Congress' intent to expansively interpret "employee."

Although Congress did not specifically consider the status of union organizers when enacting Section 2(3), it expansively referred to "employees" as "workers," "wage earners," "workmen,"[15] and "every man on the payroll."[16] Even when Congress amended Section 2(3) in 1947 specifically to exclude additional classifications from the definition of "employee," it did not narrow the general definition of "employee." Rather, Congress continued to describe "employees" inclusively as individuals "work[ing] for another for hire," and "work[ing] for wages and salaries under direct supervision."[17]

Further, Congress reassessed and rebalanced the right of an employer to require undivided loyalty from some of its workers with respect to labor unions by its 1947 amendment of Section 2(3) excluding "supervisors" from the definition of "employee."[18]

[14] Compare *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974) (based on legislative history of the Taft-Hartley Act, managerial employees are not covered by Act, although not explicitly excluded from Sec. 2(3)).

[15] H.R. Rep. No. 969, 74th Cong., 2 Leg. Hist. 2917-2918 (NLRA 1935).

[16] 2 Leg. Hist. 3119, 3220 (NLRA 1935).

[17] H.R. Rep. No. 245, 80th Cong., 1st Sess., 1 Leg. Hist. 309 (LMRA 1947).

[18] See *Florida Power & Light v. Electrical Workers Local 2164*, 417 U.S. 790, 807-811 (1974).

Had Congress concluded that paid organizers were not entitled to the protection afforded "employees" by the statute, it knew how to exclude them. It did not.

Under the broad terms employed by Congress when enacting and amending Section 2(3), paid organizers applying for work, or hired to work for wages under the employer's direct supervision, meet the requirements for statutory "employee" status.

4. Interpretations of Section 2(3)

a. *The Supreme Court*

Consistent with the inclusive language of Section 2(3), and Congress' expressed intent to expansively define "employee," the Supreme Court has consistently interpreted Section 2(3) broadly to cover individuals not explicitly excluded. The seminal case is *Phelps Dodge Corp. v. NLRB*, supra, where the Supreme Court broadly interpreted the Act to include applicants for work as well as actual hires. The Court also rejected *Phelps Dodge*'s argument that certain strikers who had obtained employment elsewhere were not entitled to reinstatement because they were not statutory "employees." Writing for the Court, Justice Frankfurter twice characterized the definition of "employee" in Section 2(3) as a "broad" one, which "expressed the conviction of Congress "that disputes may arise regardless of whether the disputants stand in the proximate relation of employer and employee . . . ." Id. at 192 (quoting from H. R. Rep. No. 1147, 74th Cong., 1st Sess, p. 9). In these situations, emphasized Justice Frankfurter, "to deny the Board power to wipe out the prior discrimination . . . would sanction a most effective way of defeating the right of self-organization." Id. at 193.

Following Congress' 1947 amendment of Section 2(3) to exclude supervisors, independent contractors, and others, the Supreme Court reaffirmed an expansive interpretation of "employee." In *Chemical Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 166-168 (1971), the Supreme Court held that "employee" under Section 2(3) broadly covers those who work for another for hire, although not those who have retired. Similarly, in *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984), the Court said that the "breadth of 2(3)'s definition is striking: the Act squarely applies to 'any employee.' The only limitations are specific exemptions" contained in the statute. In concluding that undocumented aliens were statutory "employees," the Court relied not only on Section 2(3)'s broad language, but also on the conclusion that an expansive interpretation of the statute was consistent with "the Act's avowed purpose of encouraging and protecting the collective-bargaining process." Id. at 892.

The Supreme Court's analysis of the word "employee" under the Employee Retirement Income Security Act (ERISA), a statute that also addresses work place issues, endorses the application of common law agency principles. Thus, in *Nationwide Mutual Insurance Co. v. Darden*, 112 S.Ct. 1344, 1349 (1992), the Supreme Court, finding that "employee" under ERISA was ill defined, turned to the common law, quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739-740 (1989):

> [W]hen Congress has used the term "employee" without defining it, we have concluded that Congress intended to describe the conventional mas-

ter-servant relationship as understood by common law agency doctrine.

Only where employing traditional agency principles would thwart congressional intent or produce absurd results will the Court refuse to apply those principles. *Nationwide Mutual Insurance Co. v. Darden*, supra, 112 S.Ct. at 1349.

Under common law agency principles:

> A person may be the servant of two masters, not joint employers, at one time as to one act, if the service to one does not involve abandonment of the service to the other. *Restatment (Second) of Agency*, Section 226, pp. 498-500 (1957).[19]

NLRA Section 2(3), like its ERISA counterpart, circuitously defines "employee" as "any employee." There being no contrary congressional intent, we find no bar to applying common law agency principles to the determination whether a paid union organizer is an "employee." Under those principles, paid union organizers cannot be excluded from the definition of "employee" on the basis that they are paid by their union as well as by the employer they are attempting to organize.[20]

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[19] See also *Kelley v. Southern Pacific Co.*, 419 U.S. 318, 324 (1974); *Dellums v. Powell*, 566 F.2d 216, 222 and fn. 22 (D.C. Cir. 1977), cert. denied, 438 U.S. 916 (1978); *Beaver v. Jacuzzi Bros.*, 454 F.2d 284, 285 (8th Cir. 1972); *Mazer v. Lipshutz*, 360 F.2d 275, 278 (3d Cir. 1965), cert. denied, 385 U.S. 833 (1966).

[20] This position recently was endorsed by the District of Columbia Court of Appeals in *Willmar Electric Service v. NLRB*, 968 F.2d 1327 (D.C. Cir. 1992).

In sum, Supreme Court decisions support a reading of Section 2(3) that includes paid union organizers within the definition of employee.

b. *The Board*

Courts repeatedly have held that the task of determining "the contours of the term 'employee' properly belongs to the Board." *Chemical Workers v. Pittsburgh Plate Glass*, supra, 404 U.S. at 167.[21] When undertaking this task, the Board has uniformly interpreted "employee" in the "broad generic sense" to "include members of the working class generally."[22] Under this expansive interpretation, the Board has found that Section 2(3) covers not only employees of a particular employer, but also employees of another employer, former employees of a particular employer, applicants for work, temporary and part-time employees, and individuals attending school or working a second job.[23]

In accord with its broad interpretation of Section 2(3), the Board historically has held that paid union organizers are "employees" entitled to the Act's protections. Thus, in *Dee Knitting Mills*, 214 NLRB

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[21] See also *Sure-Tan, Inc. v. NLRB*, supra, 467 U.S. at 891; *Bayside Enterprises v. NLRB*, 429 U.S. 298, 304 (1977); *NLRB v. Hearst Publications*, 322 U.S. 111 at 130 (1944); *Iron Workers v. Perko*, 373 U.S. 701, 706 (1963).

[22] *Briggs Mfg. Co.*, 75 NLRB 569, 570 (1947); *Oak Apparel*, 218 NLRB 701 (1975). See also *Consolidation Co.*, 266 NLRB 670, 674 (1983); *Giant Food Markets*, 241 NLRB 727, 728 fn. 3 (1979); *Little Rock Crate & Basket Co.*, 227 NLRB 1406 (1977).

[23] *Briggs Mfg. Co.*, supra, 75 NLRB at 570; *Little Rock Crate & Basket Co.*, supra; *Oak Apparel*, supra, 218 NLRB at 707; *L. D. Brinkman Southeast*, 261 NLRB 204, 210 (1984).

1041 (1974), enfd. mem. 538 F.2d 312 (2d Cir. 1975), the Board held that "an employee does not lose his status because he is also paid to organize." Id. In *Oak Apparel*, supra, the Board adopted the administrative law judge's conclusion that:

> The definition in the Act provides that "the term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise. . . ." While the definition expressly excludes particular kinds of employees, [paid union organizers] would not fall into any of these excluded categories. In accord with the broad application given to this definition, the Board and the courts find generally that individuals who are hired by, work under the control of, and receive compensation from, an employer, are employees of that employer and entitled to the protection of the Act, including cases where they were employed on a part-time or temporary basis; were attending school; were working on a second job; or in other circumstances which indicated they intended to remain on a particular job for a limited time. [Footnote omitted.]

The Board in *Oak Apparel* rejected the argument that the discharged union organizers were not "employees" because they did not intend to remain in the respondent's employ beyond the period required for organization.[24] The Board found it immaterial for

[24] The Board also rejected the contention that the paid organizers in *Oak Apparel* were not employees because the union directed their organizational activities and controlled their employment through compensation.

purposes of Section 8(a)(3) whether the discharged organizers sought permanent employment with the respondent. Permanency of employment, the Board held, was relevant for election purposes, but was unrelated to the issue of "employee" status. Id. at 701, citing *Phelps Dodge Corp. v. NLRB*, supra, 313 U.S. at 192; *Dee Knitting Mills*, supra. To hold otherwise, concluded the Board, would result in employers discriminating "with impunity against temporary or casual employees who are not includable in any bargaining unit." Id. Since *Oak Apparel*, the Board consistently has held that paid union organizers are statutory employees entitled to the Act's protection.[25]

c. *The courts of appeals*

The Second, Third, and District of Columbia Circuit Courts of Appeals agree with the Board that a paid union organizer can nonetheless be an "employee" under the Act. See *NLRB v. Henlopen Mfg.*, 599 F.2d 26, 30 (2d Cir. 1979) (dictum);[26] *Escada (USA), Inc. v. NLRB*, 140 LRRM 2872 (3d Cir. 1992), enfg. mem. 304 NLRB 845 (1991); *Willmar Electric Service v. NLRB*, 968 F.2d 1327 (D.C. Cir. 1992). Two courts of appeals disagree with the Board. See *NLRB v. Elias Bros. Big Boy*, 327 F.2d

[25] *Anthony Forest Products*, 231 NLRB 976, 977-978 (1977); *Lyndale Mfg. Corp.*, 238 NLRB 1281, 1283 fn. 3 (1978); *Margaret Anzalone, Inc.*, 242 NLRB 879, 888 (1979); *Palby Lingerie, Inc.*, 252 NLRB 176, 182 (1980); *Pilliod of Mississippi*, 275 NLRB 799, 811 (1985); *Multimatic Products*, 288 NLRB 1279, 1313 fn. 226, 1316 (1988).

[26] The Second Circuit refused to enforce the Board's order on other grounds, however.

421, 427 (6th Cir. 1964); *H. B. Zachry Co. v. NLRB*, 886 F.2d 70 (4th Cir. 1989).

5. Reexamination of our interpretation of Section 2(3)

On reexamination of our analysis of the scope of Section 2(3) in *Oak Apparel* and its progeny, we conclude that the definition of "employee" encompasses paid union organizers.

As more fully explained above, we rely on: (1) the language of Section 2(3) which, given its ordinary meaning and Congress' determination not to place paid union organizers among its other exclusions, must be read inclusively to encompass paid organizers; (2) the Supreme Court's consistently broad interpretation of Section 2(3) and its application of common law agency principles to find that an individual cannot be excluded from the definition of "employee" on the basis that he is being paid by two employers; (3) the reasoning found in our own precedents, most recently approved by the District of Columbia Circuit in *Willmar Electric Service*, supra, that, among other things, rejects the position that because the employment of paid union organizers is of limited duration they cannot be "employees."

The Respondent and its amici rely on the Fourth Circuit's reasoning in *H. B. Zachry v. NLRB*, supra. The court held that it would distort the "ordinary meaning" of "employee" to include within the 2(3) definition someone who was employed and directed in his organizing efforts by the union and who would continue to receive wages and benefits from the union while he was also employed by the employer being organized (citing *Chemical Workers v. Pittsburgh Plate Glass*, supra, 404 U.S. at 167-168). *H.B. Zachry v. NLRB*, supra, 886 F.2d at 73.

The District of Columbia Circuit in *Willmar Electric Service v. NLRB*, supra, recently addressed this point. The court applied common law agency principles to interpret Section 2(3) to include concurrently employed paid union organizers.[27] Observing that a paid organizer's employment would give him a better perch from which to propagandize, the *Willmar* court nonetheless found that this was inadequate to distinguish the paid organizer from an unpaid union zealot, who was plainly an "employee." We agree and conclude that union organizers are "employees."[28]

C. *Policy Considerations*

We next consider whether protecting paid union organizers as "employees" furthers the policies of the National Labor Relations Act.

The right to organize is at the core of the purpose for which the statute was enacted.[29] No coherent pol-

[27] The court cited *Nationwide Mutual Insurance Co. v. Darden*, supra, 112 S.Ct. at 1344, in support of its application of common law agency principles. Id. at 1329.

[28] In our view, the Respondent's restrictive definition of "employee" to exclude those working for two employers at the same time draws little support from its citation to *Chemical Workers v. Pittsburgh Plate Glass*, supra. There the Supreme Court held that the statutory language must be given its "ordinary meaning;" nothing in that decision points to a conclusion that dual-employed individuals fall outside the ordinary meaning of "employee." On the contrary, the Supreme Court expansively interpreted "employee" in *Pittsburgh Plate Glass* to include anyone working for another for hire.

[29] *NLRB v. Hearst Publications*, supra at 126 (1944); *Phelps Dodge Corp. v. NLRB*, supra, 313 U.S. at 193 ("the

icy considerations to the contrary have been advanced that do not, on analysis, resolve themselves into arguments that employers be permitted to discriminate based on an individual's presumed or avowed intention to join or assist a labor organization.[30]

We find no conflict between protecting paid union organizers as employees and legitimate managerial rights:

> Protection of the workers' right to self-organization does not curtail the appropriate sphere of managerial freedom; it furthers the wholesome conduct of the business enterprise. *Phelps Dodge Corp. v. NLRB*, supra, 313 U.S. at 182.

While working for the employer, the paid organizer is subject to its discretion and control, and is responsible for performing assigned work. The organizer's activities, like those of any employee, may be limited pursuant to lawful no-solicitation rules. *Republic Aviation Corp. v. NLRB*, supra, 324 U.S. at 802-803 fn. 10. Outside work time, however, the organizer—like other workers—is free to solicit for the union. Id. The fact that a paid organizer may approach his non-work time organizing activities with greater vigor than an unpaid union adherent is not an acceptable basis for denying the organizer statutory protections.

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central purpose of the Act [is] directed . . . toward the achievement and maintenance of workers' self-organization"); *Republic Aviation v. NLRB*, 324 U.S. 793, 797 (1945).

[30] Paid organizers are not employees because they fulfill the important function of providing coworkers with information on their rights to self-organization. Having concluded that paid organizers are employees, however, their employment furthers this fundamental policy of the Act.

The Respondent and its amici also contend that finding that an organizer is an "employee" within the ambit of Section 2(3) would impinge on the employees self-determination rights because the union organizer would be paid by the union to vote for it in an election.

The organizer's status as a statutory employee does not, however, ensure his right to vote.[31] In determining whether statutory "employees" are eligible to vote, the Board applies a traditional "community of interest" test. *Multimatic Products*, supra, 288 NLRB at 1316. Under this test,[32] paid union organizers fre-

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[31] Note, *H. B. Zachry Co. v. NLRB: Paid Full-Time Union Organizer Not an "Employee,"* 50 La. L. Rev. 1211, 1217 (1990). The Board is free to exclude statutory employees from bargaining units who are otherwise protected by the Act. *NLRB v. Action Automotive*, 469 U.S. 490, 498 (1985). See generally *NLRB v. Hendricks County Rural Electric Corp.*, 454 U.S. 170, 190 (1981). As stated in *Oak Apparel*, supra, 218 NLRB at 701:

> The distinction between an employee's status with respect to the appropriate unit and his or her status as an "employee" within the meaning of Section 2(3) has been recognized since the infancy of the administration of the Act.

[32] Paid union organizers do not, however, forfeit their status as "employees" because they do not intend to retain their employment beyond the duration of an organizing campaign. Although the permanency of employment is relevant to the issue of voter eligibility, it is irrelevant to "employee" status. *Oak Apparel*, 218 NLRB at 701. It is well settled that temporary employees are within the ambit of Sec. 2(3) and are entitled to the Act's protections. See, e.g., *Pennsylvania Electric Co.*, 289 NLRB 1200 (1988); *EDP Medical Computer System*, 284 NLRB 1232 (1987). To hold otherwise, and single out paid union organizers for exclusion from 2(3)

quently are excluded from voting, either as "temporary" employees, or because their interests sufficiently differ from those of their coworkers.[33] In short, employee status is not synonymous with voter eligibility. *Willmar*, supra at 1330. Accordingly, any concern over unions packing bargaining units with their paid functionaries is, in our experience and judgment, misplaced.

Next, the Respondent relies on the Fourth Circuit's determination that our approach does not sufficiently account for the adversary relationship between employer and union. The circuit relied on the Supreme Court's decision in *NLRB v. Babcock & Wilcox*, supra, among other things, as supported for this view.

Our determination that paid union organizers are "employees" is, however, completely consistent with the philosophy of *NLRB v. Babcock & Wilcox Co.*, supra. *Babcock & Wilcox*, as recently reaffirmed by the Supreme Court in *Lechmere, Inc. v. NLRB*, 112 S.Ct. 841 (1992), balances the property rights of employers against the Section 7 rights of employees to learn about self-organization from nonemployees. This balancing process, however, is inapplicable to 2(3) employees. Neither *Babcock & Wilcox* nor *Lechmere* interpret Section 2(3), or so much as hint that property rights may be resurrected as a device

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coverage as "temporaries" flies in the face of Sec. 7 protections. Of course, employers may lawfully refuse to hire individuals seeking temporary employment, where the refusal is based on neutral hiring policies, uniformly applied. *Willmar Electric Service*, supra, 303 NLRB 245, 246 fn. 2.

[33] *Oak Apparel*, supra, 218 NLRB at 701; *Dee Knitting Mills*, supra, 214 NLRB at 1041; *299 Lincoln Street, Inc.*, 292 NLRB 172, 180 (1988).

to bar activity long protected by the statute.[34] Instead, they address the lawful restrictions that employers can place on nonemployees. See *Willmar* at 1330.

The Respondent and its amici vigorously contend that paid union organizers will engage in union activities to the detriment of work assigned by the employer or will embark on acts inimical to the employer's legitimate interests. We do not agree. The statute's premise is at war with the idea that loyalty to a union is incompatible with an employee's duty to the employer. The fact that paid union organizers intend to organize the employer's work force if hired establishes neither their unwillingness nor their inability to perform quality services for the employer. Indeed, because the organizers seek access to the jobsite for organizational purposes, engaging in conduct warranting discharge would be antithetical to their objective. No body of evidence has been presented that would support any generalized, or specific, finding that paid union organizers as a class have a significant, or indeed any, tendency to engage in such conduct.

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[34] Amici argue that paid union organizers are not "employees" because their request for employment is a guise to gain access to the employer's private property to further the union's objectives. Although gaining such access likely will facilitate the paid organizer's union activities, as long as the organizer is able, available, and fully intends to work for the employer if hired, he will not be disqualified from "employee" status. Further, a paid union organizer employee arguably poses no greater threat to an employer's property rights than a prounion employee who voluntarily engages in organizational activity. Note *H. B. Zachry Co. v. NLRB: Paid Full-Time Union Organizer Not an "Employee,"* 50 La. L. Rev. 1211, 1215-1216 (1990).

The statute is founded on the belief that an employee may legitimately give allegiance to both a union and an employer. To the extent that may appear to give rise to a conflict, it is a conflict that was resolved by Congress long since in favor of the right of employees to organize. To hold otherwise at this late date would require "some type of transcendent loyalty" on the part of an "employee" to the employer that, in theory, even the Fourth Circuit would not require. *Zachary*, supra, 886 F.2d at 73.[35]

Our decisions finding that union organizers are not meaningfully distinguishable from other "employees" under the statute should not be read, however, to give paid union organizers carte blanche in the workplace. If the organizer violates valid work rules, or fails to perform adequately, the organizer lawfully may be subjected to the same nondiscriminatory discipline as any other employee. See *Wellington Mfg. v. NLRB*, 330 F.2d 579 (4th Cir. 1964), cert. denied, 379 U.S. 882 (1964); *Sears, Roebuck & Co.*, 170 NLRB 533 (1968). In the absence of objective evidence, however, we will not infer a disabling conflict or presume that, if hired, paid union organizers will engage in activities inimical to the employer's operations. Thus,

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[35] Although employers lawfully may insist that employees adequately perform assigned work, they cannot insist that employees forego organizing activities, or treat those activities as disloyalty. *Texaco, Inc. v. NLRB*, 462 F.2d 812, 814 (3d Cir. 1972), cert. denied 409 U.S. 1008 (1972); *Misericordia Hospital Medical Center v. NLRB*, 623 F.2d 808, 813 (2d Cir. 1980). Employees have the fundamental right to urge their coworkers to support the union, on company property, outside working hours. *Republic Aviation v. NLRB*, supra.

we find no policy reason to disregard present decisional law to find that since a union organizer serves the union as well as the company he is eliminated from the definition of employee under Section 2(3) of the Act.[36]

Having carefully reviewed the language of Section 2(3), its legislative history, policy, and the wealth of decisional law interpreting this statutory provision,

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[36] We find no merit in the Respondent's contention that because an employer's payment of wages to the organizer partially offsets the union's obligation to pay him, this payment may violate Sec. 8(a)(2)'s proscription against employers contributing financial support to unions. Organizer employees are paid by the employer for work performed for the employer, not for the union. We also note that Sec. 302 of the Labor Management Relations Act specifically contemplates that paid union personnel can be "employees" of other employers. Thus, although Sec. 302 generally prohibits employers from paying union employees, it expressly exempts payments by employers "to any . . . employee of a labor organization, who is also an employee . . . of such employer, as compensation for, or by reason of, his service as an employee of such employer. 29 U.S.C. § 186(c)(1) (1988).

The Chamber of Commerce asserted at oral argument that paid organizers are not 2(3) employees because they work for labor organizations which are not "employers" under Sec. 2(2). We reject this argument. Although Sec. 2(3) expressly excludes individuals who work for persons who are not statutory "employers," labor organizations are 2(2) "employers" of their own employees. Further, it it immaterial for purposes of our analysis whether unions are statutory employers; the organizer derives his "employee" status from his employment, or attempted employment, with the hiring entity. Thus, for example, an agricultural employee (who is excluded under Sec. 2(3)), or a Federal Government employee (who works for an entity outside Sec. 2(2)), would nonetheless be a 2(3) employee if he sought dual employment with a statutory employer.

we reaffirm our adherence to *Oak Apparel* and its progeny. We conclude that full-time, paid union organizers are "employees" entitled to the Act's protections.

For these reasons, we conclude that all the applicants, including Priem and Shafranski, who sought employment with the Respondent on September 7, 1989, were employees within the meaning of Section 2(3) of the Act. Thus, we adopt the judge's findings that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to consider for employment the 10 applicants named by the judge because of their union affiliation and by subsequently discharging Hansen because of his organizing efforts.

ORDER

The National Labor Relations Board orders that:

A. Respondent Town & Country Electric, Inc., Appleton, Wisconsin, its officers, agents, successors, and assigns, shall take the action set forth in the recommended Order of the administrative law judge.

B. Respondent Ameristaff Personnel Contractors, Ltd., Minneapolis, Minnesota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating job applicants concerning their union membership.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its facility in Minneapolis, Minnesota, copies of the attached notice marked "Appendix."[37] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notice to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

MEMBER OVIATT, concurring.

For reasons set forth in my concurring opinion in *Sunland Construction Co.*, 309 NLRB 1221 (1992), I join in the majority's findings in this case.

MEMBER RAUDABAUGH, concurring.

For the reasons stated in my concurring opinion in *Sunland Construction Co.*, 309 NLRB 1221 (1992), I concur in the finding of a violation here.

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[37] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT coercively interrogate job applicants concerning their union membership.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

AMERISTAFF PERSONNEL
CONTRACTORS, LTD.

DECISION

STATEMENT OF THE CASE

JOEL A. HARMATZ, Administrative Law Judge. This case was tried in Minneapolis, Minnesota, on December 11-14, 1989, on an initial unfair labor practice charge filed on September 25, 1989, and a consolidated complaint issued on November 16, 1989, alleging that the Respondents are joint employers on a specific project in International Falls, Minnesota, and in connection therewith engaged in numerous independent 8(a)(1) violations, and, further, violated Section 8(a)(3) and (1) of the Act by refusing since September 7 to hire 12 applicants for employment; by since September 13, refusing to hire Charging Party Charles Evans; by on September 14, discharging Malcolm Hansen; and by since September 20, refusing to hire Roger Kolling. In duly filed answers, the Respondents denied that any unfair labor practices were committed. Following close of the hearing, briefs were submitted on behalf of the General Counsel, the Charging Party, and separately, for each of the Respondents.

On the entire record, including my opportunity directly to observe the witnesses and their demeanor,[1]

[1] The witnesses presented by each side to this controversy, for the most part, were not entirely credible, thus, complicating the factfinding process. In that connection, my direct, personal observation of the witnesses was often a factor influencing resolutions of credibility. However, plausibility, or the lack thereof in a line of testimony, was given greater weight and was the controlling factor more often than not. It is for this latter reason that many critical resolutions follow no clear pattern and facially appear asymmetrical. Thus, in certain instances, I believed and disbelieved the same witness, though the testimony conflicted with the same opposing

and after considering the posthearing briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Town & Country Electric, Inc., a Wisconsin corporation (T & C), from its facilities in Appleton, Wisconsin, is engaged as an electrical contractor in the construction industry. In the course of that operation, it annually provides services valued in excess of $50,000 directly to customers located outside the State of Wisconsin.

The Respondent, Ameristaff Personnel Contractors, Ltd. (Ameristaff), a Wisconsin corporation, from its facilities in Green Bay, Wisconsin, is engaged in operation of a temporary employment agency. In the course of that operation, Ameristaff annually provides services to T & C valued in excess of $50,000.

On the foregoing, I find that the Respondents T & C and Ameristaff are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANZATIONS INVOLVED

The complaint alleges, the record demonstrates, and I find that the International Brotherhood of Electrical Workers, Local 292, AFL-CIO and its sister, Local Union 343, admit employees to membership and, at least in part, exist for the purpose of representing them in the negotiation and adminis-

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witness. These diverse, seemingly inconsistent resolutions, were framed on the basis of my impressions which varied as the context shifted, rendering one line more logical than the other.

tration of collective-bargaining agreements, and hence are labor organizations within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. *Preliminary Statement*

This is another case in which recruitment patterns and hiring decisions by a "merit shop" contractor have collided with the job recovery strategy of unions in the construction industry.[2] Merit shop is a code word for nonunion. Being a merit shop employer, the Respondent T & C, was unaffiliated with any labor organization. Its electrical operations, however, require access to craftsmen whose skills are comparable to those traditionally represented by AFL-CIO building trade unions, namely, the International Brotherhood of Electrical Workers.

Early in September 1989,[3] T & C was awarded electrical renovation work at a paper mill operated by Boise Cascade in International Falls, Minnesota. Work at that location was to be performed in accord with the Minnesota law. Among the statutory restrictions is a requirement that one electrician licensed by the State be employed for every two engaged in electrical work on the job.[4] Based in Appleton, Wisconsin, T & C was a nonresident contractor, with limited experience on Minnesota projects.

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[2] See, e.g., *Sunland Construction Co.*, Case 15-CA-10618-1, et al. (9/5/89); *J. E. Merit Constructors*, JD-13-90, Case 15-CD-10661 (1/26/90).

[3] All dates refer to 1989, unless otherwise indicated.

[4] The Minnesota requirements for licensing are: (1) 8000 hours of verifiable craft work, and (2) successful completion of a Class "A" journeyman electrician test.

Work was to begin on Monday, September 11. T & C, the largest nonunion electrical contractor in the State of Wisconsin, in early September, did not have a single electrician licensed in Minnesota, either within its files or among its work force of some 260.[6] Moreover, as a nonunion operator, T & C does not solicit from, and hence could not fill its need from union hiring halls.

To obtain qualified electricians, and ultimately to locate craftsmen licensed in Minnesota, T & C retained Respondent Ameristaff, a temporary employment agency, to stir the labor markets, and ultimately, to stand, at least frontally, as the immediate employer of the manpower secured for T & C's account.

The instant complaint arises from union efforts to infiltrate the recruitment process. Attempts of this sort to obtain work with nonunion contractors, and organize them from within, stands as a recent innovation. It is a marked departure from historic measures used by building trade unions in the ongoing struggle to preserve jobs and negotiated labor standards. In the past, most, if not all, skilled trade unions had endeavored to protect their respective crafts by denying skilled labor to nonunion contractors, a tactic highly effective in a transient industry, where hiring halls provide a convenient source of qualified craftsmen in virtually all geographic areas. This sequestration of union labor was facilitated by constitutional bans on nonunion employment, which are subject to enforcement against members through internal disciplinary machinery. In recent years,

[6] This figure includes about 25 unskilled workers, 71 indentured apprentices, and 130 journeyman electricians.

however, employment opportunities with union contractors have declined, causing construction unions to take a second look at the growth of nonunion competition. To that end, a market recovery strategy was fashioned as a means of organizing nonsignatory employers. Hence, in 1988, Locals 292 and 343 authorized their membership to work nonunion, if for organizational purposes. (R. Exhs. 4(c) and (e).) A fund was established to reimburse members for wage, travel, and health benefit differentials, that he suffered on such jobs.

This strategy was unleashed against T & C under conditions of surprise during a Minneapolis recruitment effort waged in conjunction with the Boise-Cascade project. Thus, T & C's response to the union initiative forms the premise for allegations of discrimination on behalf of disappointed job seekers, all members of Local 292, who responded in person at a recruitment session held at a Minneapolis hotel on September 7, and others who made individual phone contacts with T & C. Of the applicants, a single member of Local 292 was hired, and the General Counsel contends that this individual, Malcolm Hansen, was discharged unlawfully on September 14, after unsuccessful attempts on behalf of T & C, to curtail his organizational activity.

B. *Concluding Findings*

1. The joint-employer issue.

Operationally, T & C's arrangement with Ameristaff afforded access to manpower, under a shield from traditional employment obligations. Unlike T & C's own employees, T & C assumed no liability for fringe benefits as to those carried on the payroll of

Ameristaff and other similarly situated agencies with which it deals. Insofar as might be discerned from this record, Ameristaff's involvement in connection with the Boise-Cascade operation was restricted to advertising, communicating with job prospects, compiling completed applications, arranging the accommodations for interviews, and completing the paperwork necessary to maintain payroll for those hired. Ameristaff neither interviewed, nor influenced hiring decisions,[6] and had no presence, and hence no overseeing role, at the Boise-Cascade jobsite. Most, if not all, conventional employment prerogatives were retained by T & C. Interviewing, hiring, supervising,[7] the setting of wage rates and granting of increases,[8]

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[6] Steven Buelow, Ameristaff's president, testified that he had no role during the Minneapolis recruitment operation other than to distribute and collect applications. Defferding testified to the contrary, suggesting that, at least in the case of Malcom Hansen, who was "selected" by Defferding and Sager, Buelow was involved in that process "because he [Hansen] was going to be Mr. Buelow's employee." As between the two, Buelow overwhelmingly was the more credible.

[7] According to Buelow, Ameristaff "never purported to supervise or direct employees" of its clients. An instructional guide provided to employees by Ameristaff states that: "All client rules and regulations apply—you are working under their direction and supervision." G.C. Exh. 14.

[8] As shall be seen, Malcolm Hansen was the sole Ameristaff employee on the Boise-Cascade job. T & C established his wage rate. When Hansen received a wage increase, it was at T & C's election. According to Steven Buelow, Ameristaff's president, it billed T & C based on a formula which incorporated Hansen's wage rate and per diem as a multiplier.

and, for all intents and purposes, discharges,[9] were matters reposed to exclusive discretion of T & C operatives.

On these facts, it is indisputable that T & C exercised plenary authority and control over employees retained by Ameristaff for its account. In these circumstances, even absent a joint-employer relationship,[10] Ameristaff, having a mere nominal role, possessed the legal vestiges of an agent whose conduct, in connection with the manning of the Boise-Cascade job, was binding on T & C.[11] See, e.g., *Storall Mfg. Co.*, 275 NLRB 220 fn. 3 (1985).

2. The embassy suites allegations

a. *The issues*

This phase of the case is premised on a mass refusal to consider certain Local 292 members[12] in the

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[9] Buelow testified that on September 13 he was informed by T & C to terminate Hansen. His lack of control in such matters was explained as follows:

> [T]he client has the ability to terminate that contract at any time . . . . If the guy is not working out or if they didn't have any more work for them, they have the right to terminate the contract.

[10] T & C contests joint-employer status, citing authority which is inapposite. Thus, see *Slurry Matic, Inc.*, 169 NLRB 184, 185 (1968), concerned an allegation that two entities were a "single employer," a concept subject to a more rigorous test than joint employer. See, e.g., *Pacific Mutual Door Co.*, 278 NLRB 854, 858 fn. 18 (1986).

[11] The opposite does not follow. Thus Ameristaff shall not be deemed responsible for independent unlawful conduct on the part of T & C over which it had no authority or control.

[12] Local 292's geographical jurisdiction includes the Greater Minneapolis area and the five surrounding counties.

course of an interview session conducted in Minneapolis on September 7. All but two that attended, completed applications at that time. Only one covered by this immediate allegation was interviewed. In addition to the alleged discrimination, certain independent 8(a)(1) allegations are imputed to Ron Sager, T & C's manager of human resources, and Steven Buelow, Ameristaff's president and owner. The coercive conduct includes interrogation of applicants concerning their interest in union work; statements that applicants would be employed only at union projects; threats that those without "appointments" would be placed in a file for union jobs only and would not be considered for employment on nonunion jobs; and statements that union members could not be hired.

The Respondents deny that their representatives either unlawfully questioned, threatened, expressed a preference, or attempted to impede organization. Furthermore, it is argued that the failure to interview those present, was based on considerations totally unrelated to union activity. Thus, T & C urges that I credit evidence that the time available to complete the process impelled T & C to confine interviews to those with prescheduled appointments.

b. *Factual overview*

Ron Sager was primarily responsible for manning the Boise-Cascade job. He was informed in late August or early September that T & C had secured an electrical contract in International Falls, Minnesota. He testified that he was told that the job was to be treated as a short-term operation, since T & C would have to survive a 3-month trial period to be retained.

Initially, Sager faced two problems. First, he had little lead time, as work was scheduled to begin on September 11, and, second, he had no clear source of required manpower. Moreover, because the job was described as short term, he allegedly did not wish to hire from the outside on a "permanent" basis. Therefore, on September 1, he contacted Steven Buelow, Ameristaff's owner and president, requesting that Buelow investigate the availability of electricians for a "short term" job in Northern Minnesota, adding that he needed an answer by 5 p.m.

Having been retained by T & C to recruit qualified electricians, Ameristaff followed up in area newspapers. On September 3, 1989, a blind advertisement appeared in a major Minneapolis newspaper announcing employment opportunities for "licensed journeymen electricians." Despite Sager's testimony that the job was short term, the ad described the project as having a "two-year" duration. (G.C. Exh. 2.) The telephone number of Ameristaff was included.

Members and officials of Locals 292 and 343 learned of the advertisements. Unemployed members were encouraged to respond.

On September 5, according to Buelow, Sager made it clear that among other things, any prospects had to be "able to work a merit shop," which quite correctly was understood by Buelow as reference to a nonunion shop. Buelow relates that, at some time prior to September 7, this was clarified by T & C to mean those willing to relocate and "work a merit shop."

Ameristaff customarily prescreens applicants to determine if they meet the client's criteria. In anticipa-

tion of responses to the ads, Buelow set up a screening process for Ameristaff's receptionist, Lorrie. She was instructed, inter alia, to inquire whether job seekers preferred to work union or nonunion, and that, should they respond that they were in a union, or had only worked union, Lorrie was to ask if they would work nonunion.

Sager relates that on Tuesday, September 5, after the ad had run, Sager first learned of the journeyman/helper ratio under Minnesota law. For this reason, Sager instructed Ameristaff that only licensed electricians interested in working for a merit shop employer would be hired for the Boise-Cascade job. Ameristaff had been informed that T & C needed more than one licensed electrician. On September 5, Ameristaff was first informed, on a confidential basis of the location of the job.

As indicated, work was to commence at International Falls on Monday, September 11. Sager and the designated project manager, Dennis Defferding, were aware, at least since September 5, that the job could not begin until hire of at least one journeyman or master electrician who was licensed in Minnesota. Thus, Sager's testimony that as of September 7, he was "pretty anxious" to hire a licensed electrician comes as no surprise.

To meet this requirement, Buelow, had scheduled appointments for the Embassy Suites in Minneapolis on Thursday, September 7. That day, T & C chartered an aircraft to transport Buelow, and T & C's Sager and Defferding from Appleton, Wisconsin, to Minneapolis. About 14 unemployed members of Local 292, including 2 full-time salaried officials of that organization, appeared at the Embassy Suites in quest

of work. Applications, under Ameristaff logos, were distributed and completed. Interviews were conducted by Sager and Defferding. Three were interviewed, two were offered jobs, but only one, Malcolm Hansen, was hired. However, the hiring process was cut off before any others would be interviewed. None of this latter group was subsequently contacted by T & C.

c. *The evidence*

The complaint identifies 12 applicants, all members of Local 292, as having been denied employment wrongfully in consequence of the September 7 interview session. Those named are as follows:

Ken Axt	Red Larson
Steve Claypatch	Roger Chartrand
Steve Leyendecker	David Hagen
Robert Hallman	Bob Printy
Craig Jones	Greg Shafranski
Harley Barton	Michael Priem

Of this group Priem and Shafranski were paid business representatives of Local 292.[13] The rest, including Claypatch, a nonpaid member of that Local's executive board, were apparently unemployed.

All except Chartrand filed applications.[14] Of this group only Jones was interviewed. Parenthetically,

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[13] T & C argues that Priem and Shafranski, because of their status as paid, full-time union officials, are not entitled to redress under the Act. As matters now stand, that issue is currently before the Board on remand and might well be subject to reconsideration in *H. B. Zachry Co.*, [289 NLRB 838 (1988)], enf. denied 886 F.2d 70 (4th Cir. 1989). Under current Board policy, however, this defense is nonmeritorious.

[14] G.C. Exh. 13. Chartrand arrived late, after applications were solicited. He testified that he was denied an opportunity

it is noted that a longstanding member of Local 292, Malcolm Hansen, was interviewed and actually hired. The third and only other person extended an interview was Gary Weseman, a nonaffiliate of Local 292.

More specifically, a composite of credible testimony of Sager and Priem reveals that, due to a flight delay, the interview team did not arrive until 11 a.m. Two rooms had been reserved. One was arranged as a waiting area, with refreshments and tables for completing applications; the other was used for actual interviews. After the entire group repaired to this area, those assembled were addressed initially by Sager. He first explained the benefits provided by T & C, including its health and 401(k) plan. Buelow of Ameristaff then distributed applications, which bore the Ameristaff logo, for completion by those present. (G.C. Exh. 3.) Later, Buelow gathered the completed applications and carried them to the room in which interviews were conducted.[15]

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to submit an application because those officiating were in a hurry to leave. He states that someone took his name, address, and telephone number, advising that he would be in touch. Chartrand, who claims to have been desperate for work, received no further contact. Another individual who arrived late, failing to file an application was Steven Shannon. His name was deleted from the complaint at the outset of the hearing. In her posthearing brief, counsel for the General Counsel represented that Shannon arrived after the interview team had left and hence had no personal contact with them.

[15] I reject Priem's uncorroborated testimony that after collecting the applications, Buelow stated that they needed eight people immediately for this project. From all indications on this record, that figure went well beyond T & C's needs, and Priem's testimony in this regard impressed as a pat, unbelievable attempt to broaden the former's liability under this complaint.

Craig Jones was the first interviewed and Gary Weseman, the only nonmember of Local 292, was second. It is important to bear in mind that Weseman was the only applicant present that Buelow had previously scheduled for an interview. (R. Exh. 10.)

There also is no dispute that Buelow, after collecting the completed applications, returned to the waiting room. A dispute existed as to what was said, but under all versions, it is clear that the applicants were informed that the job in question was nonunion.[16] After Buelow was informed that the men were interested in any work available, he left again. He again returned after about 15 minutes to read off a list of seven names. None were present. Buelow identified this group as those with prearranged appointments, then stated that: "we don't know if we can interview the rest of you because you didn't have appointments." Buelow was advised by Priem that at least eight licensed journeymen were present who could take the place of those with appointments.

After this, Buelow again left the waiting area, this time returning with Sager. The latter informed that he had to catch a plane and that: "We are only going to interview people that had appointments and . . . we are asking everybody to leave if you don't

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[16] Buelow claims that Ameristaff enjoys a clientele which includes union as well as nonunion contractors. The union contractors are not identified, nor are the particular unions with which they deal. Customarily, however, construction contractors that have bargaining relationships with *affiliated* craft unions, will obtain skilled personnel from the latter's hiring hall, either on a compulsary or voluntary basis. To say the least, Buelow's testimony aroused curiosity as to why this class of "unionized contractors" would bother with a commercial, fee-based, manpower agency.

have an appointment." Malcolm Hansen protested, stating that he called the number in the newspaper ad and was told to "show up." He announced that he would not leave until interviewed. Sager then threatened to call the local authorities and have them removed. However, he also informed Hansen that he would check and if Hansen had an appointment he would "honor the commitment." When Sager was informed by Buelow that Hansen had called Ameristaff that morning, he elected not to labor the point, but to interview Hansen, while announcing to the others: "I will not interview anybody else, because we've got to get going." Hansen was hired. Thereafter, the session was terminated. Other than Hansen and Jones, no one that completed an application that day was ever interviewed or, for that matter contacted, by either T & C or Ameristaff.

d. *Analysis*

(1) The discriminatory refusal to employ

The 8(a)(3) allegations concerning this group might be viewed from two perspectives; namely, the failure to interview and the post-September 7 failure to seek out the union allied, job seekers during T & C's ongoing quest for licensed electricians.

Before considering the General Counsel's case, the issues might be simplified by acknowledging T & C's contention that on or about Tuesday, September 12, Sager received information which made it economically infeasible to consider the Embassy Suites applicants. It was confirmed at that time that under Minnesota law, Ameristaff could not be used as the employer of licensed personnel on the Boise-Cascade job. Yet, T & C would incur liability for "placement

fees" if it used the Embassy Suites applications, all of which were solicited by Ameristaff. The minimum guarantee to Ameristaff would be $1320 per applicant. T & C argues that to avoid this expense, that avenue was abandoned in favor of in-house recruitment.[17]

The evidence supporting this claim is beyond suspicion. It basically conforms with my understanding of the business practices generally followed by suppliers of temporary manpower. To this extent, and insofar as the allegations cover the timeframe after September 7, the Respondent has met its burden of showing that these applications would not have been activated thereafter even if those seeking work were nonunion. See *Wright Line*, 251 NLRB 1083 (1980). I am persuaded that based on the "placement fees," the Embassy Suites applicants, *as unknown quantities*, would not have been considered for employment after T & C learned of Ameristaff's nullification. Other than speculation, the General Counsel has offered no cause to believe otherwise.[18]

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[17] During the ensuing week, T & C embarked on this independent search. The campaign began with the placement of ads in Minnesota newspapers and those published in surrounding States as well as Colorado, Louisiana, and Texas. Although Sager testified that the Minneapolis papers were included, documentary evidence proved this to be untrue. G.C. Exh. 17. Sager also testified that he made numerous phone calls in the effort to locate electricians licensed in Minnesota.

[18] I have no quarrel with Buelow's testimony that it was his intention—concerning applications garnered at the Embassy Suites (G.C. Exhs. 13(a)-(k))—to verify employment references, but he did not do so because Ameristaff was off the job the following week.

However, this view does not offer a complete defense. For, it fails to embrace earlier events, including any peremptory refusal to interview and consider for employment the disappointed job seekers at the Embassy Suites. If unlawfully motivated, T & C's failure to interview at that time on pending applications created an ambiguity, to be resolved against the wrongdoer, warranting an assumption that the alleged discriminatees, if given a chance, would have been hired, would have demonstrated proficiency, and would have been retained directly by T & C after Ameristaff's disqualification.[19] Thus, the events at the Embassy Suites remain viable and are central to the 8(a)(3) allegations in this case.

In this regard, there can be no question that, as of September 7, T & C was hard pressed to hire licensed electricians. At that time, operations were expected to commence at Boise Cascade on Tuesday, September 12. In the interim, between September 1 and 5, it does not appear that it had secured a single journeyman electrician either from its rolls or through Ameristaff's efforts. Indeed, on September 5, the opportunities for locating qualified personnel was squeezed further. On that date, T & C learned that Minnesota regulations precluded any operations absent an electrician licensed in that State. As of September 7, it had not secured a single electrician meeting this requirement. Moreover, T & C's des-

[19] This is not meant to imply that in the event of a finding of illegality, all named discriminatees would be entitled to monetary redress. Thus, in that event, the Respondents could cut backpay liability by demonstrating in an appropriate compliance proceeding that fewer jobs were available than discriminatees.

perate posture at the Embassy Suites was compounded by the fact that, if this venture failed, only 4 days would remain, a timeframe made even more critical by intervention of a weekend.[20]

It is in this light that the curtailment of interviews on September 7 must be evaluated. The underlying facts, without question, demonstrate that the

[20] It is not entirely clear, and it need not now be decided, just how many licensed electricians would be required at startup. Yet, I am convinced that the Embassy Suites venture fell far below expectations. Thus, a classified ad reappeared in the Minneapolis newspaper on Monday, September 11, this time describing the project as of 4-year duration. G.C. Exh. 4. Sager testified that the Respondent planned to hire 4 to 6 journeyman electricians "the first couple of weeks" on the job, and then to increase to 8 to 10 for the remainder of the job. Defferding's testimony suggested that T & C was less ambitious, at least, in terms of its hopes for the early weeks. Thus, he testified that T & C hoped to pick up one or two through Ameristaff's September 7 interviews. He added that if only one were hired, the actual work force could be expanded beyond the 2 to 1 ratio. This refers to state licensing procedures which permit unlicensed personnel to obtain temporary permits, pending completion of the certification process, allowing them to work without counting against the ratio. Defferding testified that it was T & C's intent to use two of its own employees in that fashion, thus, allowing a total work force of five, including the licensed journeyman. As matters turned out, only one T & C employee, Michael Grow, obtained a temporary license. For this reason, Project Superintendent Rodney Smithback, though on the site at all times, was essentially relegated to paperwork and could not legitimately work with the tools. On cross-examination, Defferding admitted to telling a Board investigator that in early September, T & C anticipated a need for 15 to 30 electricians on the job. I had my doubts about Defferding's account, but, in any event, issues of this nature are best left to an appropriate compliance proceeding.

Respondent elected not to consider applicants who were present, and who offered themselves as available for work and qualified as licensed electricians.

Sager's own testimony confirms that the decision not to conduct further interviews was announced only after the T & C operatives were informed that this group was believed to be allied with an affiliated labor organization. Thus, Sager relates that, after the interviews of Jones and Weseman, Buelow reported that none of the others had appointments. Sager expressed curiosity as to how those without interviews knew that the T & C representatives were present. Sager then allegedly told Buelow that they were late and had to get back to Appleton, stating that, "as bad as we needed people," he didn't want to waste time with them if Buelow "didn't screen them like the others." Buelow was told to doublecheck to assure that those waiting had no appointments. He returned, stating that those waiting had become a bit unruly. Sager admits that he at this point learned of their union affiliation, as Buelow showed him several applications, commenting, "I think they're union." Sager suspected that T & C was being harassed or being set up. He admits that it was at that point that he and Defferding decided to announce, for the first time, that interviews would be extended only to those with appointments. Sager concedes that the announcement was made before anyone had accepted employment and without knowledge that anyone present had an appointment. Thus, at that juncture, he was resigned to writeoff the Minneapolis trip as a total failure. T & C remained unprepared to meet its scheduled Boise-Cascade starting date, and merely had 2 working days to accomplish what it had not in the past 7.

Considering the circumstances confronting T & C at the time, and the fact the Embassy Suites venture was aborted immediately after learning of the union affiliation of those present, an inference is warranted that—notwithstanding the subsequent hire of Hansen—this step was taken against applicants, who together offered a broad source of ostensibly qualified electricians, at least in part on antiunion considerations.[21] Thus, the onus was on the Respondents to demonstrate that these applicants would not have been interviewed and considered even if not union members. See *Wright Line*, 251 NLRB 1083, 1089 (1990).

The defense begins with T & C's declaration that it was not antiunion, an argument which springs from the estimate that some 40 percent of its employees are or were members of the IBEW. This demographic is more a function of the impact of union training and apprenticeship programs on employment markets than any desire on the part of this "merit shop employer" to let down its guard. Indeed, T & C's own position suggests that those hired were known to be union renegades, and hence posed no organizational threat. The 40 percent statistic was furnished by Sager himself. When called on to explain how he knew of his employees' union status, Sager stated:

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[21] The existence of an untoward motivation is hardly impaired by suspicion that emerges from the Respondent's recruitment strategy following termination of Malcolm Hansen on September 14. Thereafter, the Respondent placed ads in numerous newspapers within the State of Minnesota, but, inexplicably, declined to use newspapers based in the Minneapolis area. G.C. Exh. 17. Imagination is not taxed by one's attempt to reckon the reason for this omission.

> [We]'ve gotten . . . statements from the people we've hired, that they have gotten letters in mail that they are going to be fined or that now that they are no longer a part of the union, they are working for nonunion, they have to appear before a committee of some sort and then they bring that to our attention.

Along this same line, in its posthearing brief, T & C states that it "knew that the Union's constitution and by-laws prohibited union members from working for nonunion employers," and that T & C therefore "believed the union opposed the hiring of any of its members by a nonunion employer." From this frame of mind, T & C would assume that competent electricians could be added to its payroll with little risk that ardent union members would be among those hired.

Any notion that T & C open its door with equanimity to qualified craftsmen who overtly manifested an intention to organize would be inconsistent with the economic goals of this avowed "merit shop employer." The business posture of T & C is no different than those familiar to other nonunion contractors, including that involved in in *J. E. Merit Constructors*, JD-13-90, pp. 7-8. The observations there apply with equal force to T & C:

> [T]he Respondent considers itself as among the class of contractors which refer to themselves as "merit employers." This is nothing more than a "buzz" reference to nonunion shop. It is a calling antithetical to any form of contractual relationship with traditional building trade unions. Indeed, one might fairly assume that

> this class of employers, at least in the area of costs, enjoys a labor-oriented, competitive edge in an industry where bidding wars generate revenues, and effective performance turns upon the ability to attract competent workers on a casual, short term basis. The benefit of operating nonunion in this industry is magnified when one considers that most industrial maintenance work is more labor intense than customarily encountered in other forms of construction activity, with the ratio of labor to material costs proportionately higher.
>
> There can be little debate that any formal organization drive by an affiliated labor union challenges this fundamental economic advantage. It follows that indiscriminate hiring from that source clearly would enhance that peril. In this light, hiring decisions confronting the Respondent . . . may be equated with a choice between suicide and survival.

Beyond the foregoing, the Respondent's explanation for the termination of interviews is founded on Sager's parole testimony as to intentions, not communicated to those present until after their union affiliation was discovered. Thus, it is the sense of his testimony that he at no time wished to interview anyone without a scheduled appointment and who had not been screened by Ameristaff. Yet, as indicated, prior to his learning of union involvement, no attempt was made by either Ameristaff or T & C to single out or identify those with appointments, nor was there an earlier suggestion that appointment was requisite to interview.

In this regard, however, Sager testified that, on arrival at the Embassy Suites, he simply assumed that all present had appointments.[22] He claims that he first learned that this was not the case when Buelow reported that this was not so. Thus, if Sager is to be believed, it was his intent from the outset, albeit unannounced, to interview only those with appointments, and that Buelow's report concerning the union status of those waiting did not inspire any such judgment.

The General Counsel attacks Sager's credibility on a number of grounds. First, it is argued that, on arrival, he knew, or should have known, that more job seekers were present than the seven with appointments. This raises a preliminary issue as to just how many applicants were present when the interview team arrived an hour and 30 minutes late.

Sager testified that only four to six prospects were present, prompting him to remark that it appeared that only those with appointments showed up. This is somewhat consistent with Defferding's observation that when the management team arrived at 11 a.m., "there were a couple of gentlemen in the lobby . . . waiting for us." However, according to Michael Priem, he and Greg Shafranski, both business representatives of Local 292, arrived at the Embassy Suites at about 8:30 a.m. on September 7, only to learn that the representatives of T & C and Ameristaff had been delayed. He testified, with corroboration from Malcolm Hansen, that at about 11 a.m.,

[22] In support of this deduction, Sager observes that there was no prior public announcement that T & C and Ameristaff personnel would be present in Minneapolis to conduct interviews.

Sager, Defferding, and Buelow arrived. Priem and Hansen offered names, but do not identify precisely which, or how many, applicants were present at that time, and how many arrived later. Both, however, testified that the interview team expressed pleasure with the size of the turnout. I believed Priem and Hansen, because their account was more plausible,[23] and also stood above other flaws in Sager's story.[24]

Thus, Sager elected to begin the interviews with Craig Jones, who had no appointment, yet was called without inquiry as to whether any such condition had been met. Apparently, to diminish this contradiction, Sager would have me believe that, though pressed for time,[25] he never saw Buelow's list (R.

[23] In its posthearing brief, T & C characterizes the applicants as "intruders." However, the interview team did nothing to suggest who was, and who was not welcome until union affiliation emerged. In light of the above credibility resolutions, it is concluded that Buelow, Sager, and Defferding knew, or should have known from the outset that their were more jobseekers present than Buelow had scheduled for interview. In any event, Sager admitted that were it not for the press of time, all present would have been interviewed irrespective of any lack of appointment or prescreening.

[24] In this instance, Priem and Hansen are credited over Sager and Defferding. None were entirely truthful, and as shall be seen, credibility resolutions, though based on my firm impressions are not entirely consistent in their cases. All struck as a bit too flexible with truth, willing to bend and improvise to strengthen or cover weaknesses in their respective cause. However, in this particular instance, the late arrival of the interview team enhances the likelihood of the mutually consistent accounts of Priem and Hansen, it being entirely probable that by 11 a.m. most of the Local 292 members would have appeared.

[25] The interview team's departure for Minneapolis that morning was delayed about 2 hours due to fog. Sager testified

Exh. 10), or asked Buelow who, was scheduled, and, thus, was unmindful that Jones had no appointment. Buelow had actually scheduled seven interviews. Sager testified that on the flight to Minneapolis, Buelow advised him that these were scheduled at 20-minute or one-half hour intervals. Obviously, if all showed up, simple math indicates that the interview team would be hard pressed to make it to the Minneapolis airport by 3:30 p.m., let alone return to Appleton for the meeting allegedly scheduled for that time. In this light, it is incomprehensible that Sager made no effort on arrival at the Embassy Suites, and thereafter until union activity became an issue, to monitor the number who were present and who would later arrive that were entitled to interview, and hence might delay the return trip.

In addition, Sager sought to bolster the import of prior appointments by explaining that those lacking them would not have been prescreened by Ameristaff, and he did not wish to interview those who had not

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that a "critical" manpower meeting, affecting 37 different jobs, had been scheduled for Appleton at 3:30 p.m. that very day. This, according to Sager, compacted the time available to conduct the Embassy Suites interviews. There are no written records kept of such meetings, and independent evidence that it was scheduled or held was totally lacking. Although Sager testified that the meeting was fixed, timewise, taking place every Thursday at about 3:30 p.m., no explanation was offered as to why it was necessary to schedule the Minneapolis trip that same day. Defferding was not examined as to the meeting and hence did not testify that he attended such a meeting. Sager's uncorroborated testimony in this respect does not square with his failure to diligently explore Buelow's agenda to assure effective use of the time available. He was not believed.

gone through this process. He denied knowledge, however, of what was entailed in the prescreening.[26] In fact, the prescreening format was a simplistic, handwritten system, designed for implementation by an Ameristaff clerical employee who would take calls from those responding to newspaper ads. In contrast, the applications compiled and available to Sager at the Embassy Suites offered a detailed basis for evaluating past experience and qualifications. Ameristaff's prescreening format developed little more than information concerning a prospect's will to work nonunion. There is no evidence that prescreening results were ever communicated in any form to either Sager or Defferding. Moreover, Jones obviously was not prescreened and no such requirement was mentioned in his case. Indeed, Buelow testified that Sager said nothing about whether he would interview people without appointments until after Buelow had made this report some of the applicants were union. In my opinion, Sager's testimony concerning prescreening was yet another false plank in his attempt to structure an explanation disassociating the sudden termination of the interview from disclosure that the waiting applicants were union members.[27]

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[26] G.C. Exh. 13(c).

[27] It is difficult to accept that Sager would insist on prescreening without knowledge of the areas probed in that exercise. I reject Sager's testimony that T & C neither solicited, nor was aware that Ameristaff was screening prospects along union lines. I would also note that T & C has attempted, albeit inartfully, to place a "spin" on the evidence fingering Sager as the progenitor of this inquiry. It is clear that Buelow denied that he was instructed by T & C to inquire into an applicant's union preferences. At the same time, however,

With the collapse of Sager's credibility, it follows that the interviews were terminated when T & C remained at "square one," with no appreciable leads to a single Minnesota journeyman. Though Sager was understandably "anxious" to man this job, this objective was displaced by a more compelling need to shun a waiting group of applicants, all, or some of whom, would qualify. His action, after learning of the union presence, is rationally explained by the inference generated under the General Counsel's case-in-chief. Accordingly, except in the case of Jones,[28]

Sager admittedly told Buelow that the electricians had to be willing to work for a merit shop employer. Yet, the Respondent in its post-hearing brief states:

> Buelow . . . prepared a prescreening form which, inter alia, asked applicants if they preferred union or nonunion work. *This inquiry was strictly Buelow's idea.* [Emphasis added.]

This is an "eye roller" of the first order. Could Buelow, who equated merit shop with nonunion, develop the information specifically requested by Sager without asking? Fairly stated, the "idea" was planted, if not directed, by Sager.

[28] Jones admitted that, during his interview, he characterized T & C's starting rate as an "insult." However, he denied stating specifically that he would not work for that rate. Although not given a job offer, Jones admittedly told the T & C representatives that he would have to discuss out-of-town work with his wife. He was asked whether he would consider an offer to work locally. He said he would, and then was told that his application would be kept on file. He neither contacted, nor received contact from T & C or Ameristaff, thereafter. On the face of his own testimony, T & C's officials could rightfully assume that Jones either was disinterested or would contact them after talking to his wife. In this light, it is concluded that he would not have been hired in consequence of the September 7 interview even if not allied with

it is concluded that the Respondent has failed to demonstrate by credible evidence that those named in the complaint, who filed applications,[29] would not have been interviewed and considered even if unaffiliated with Local 292. Accordingly, Respondent T & C violated Section 8(a)(3) and (1) of the Act by this peremptory conduct.

(2) Interference, restraint, and coercion

(a) *By Buelow*

The complaint alleges that the Respondents violated Section 8(a)(1) by Buelow's interrogation of Embassy Suites applicants as to whether they were looking for union work. In support, Priem testified that Buelow collected the completed applications, but, after about 15 minutes, he returned stating, "Are

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Local 292. The 8(a)(3) allegation in his case shall be dismissed.

[29] Chartrand is excluded from the remedial class. He did not file an application. Buelow admitted that he took Chartrand's name and address, but observes that there was no followup because Ameristaff was removed from the job. The problem here is the element of knowledge of Chartrand's union affiliation. He avers that Buelow asked about his employment experience. However, when examined as to which contractor he identified, Chartrand did not respond directly, replying, "I had worked for Muska [a union contractor] that year or the year before." It was my impression that Chartrand was testifying from deduction, rather than what he actually told Buelow. His testimony was unreliable, and, accordingly, unlike those filing applications, there is no evidence that either T & C or Ameristaff had any basis for distinguishing Chartrand from Weseman, who acted on his own, quite independent of any union. Thus, the General Counsel, in his case, has failed to identify this latecomer with others denied interview on union-related grounds.

you looking for all union work?" Malcolm Hansen's initial testimony describes the inquiry as, "Are you men interested in union work?" [30]

Buelow denied that he raised the "union-nonunion" issue, claiming that it was the applicants that questioned him as to the existence of union work. He claims that he replied to these inquiries by stating, "we do have both types of contractors, however, the people that were here today were representatives of Town and Country Electric and they were interviewing for the project at Boise." Thus, those present were alerted to the fact that union work was not available at that time.

In this state of events, even accepting the above accounts of Priem and Hansen, their testimony would not substantiate that Buelow's expressed curiosity was coercive. The failure by the General Counsel to analyze and cite precedent in conjunction with what, at best, presents a thin, borderline issue is inexcusable.[31] Without benefit of guidance, it is my

[30] The General Counsel's witnesses were not entirely consistent. Thus, Don Larson, also a member of Local 292, testified that Buelow returned and simply announced "that this was a nonunion job." Thus, his testimony fails to reflect any element of interrogation.

[31] Region 18 apparently gave a great deal of attention to certain evidence uncovered during the investigation which triggered the 8(a)(1) allegations in this case. Legally and factually, these issues demand the same degree of attentiveness on the part of the undersigned as the other, remedially robust issues in this case. Here, counsel for the General Counsel filed a 43-page brief, a document, virtually useless to any reasoned evaluation of the Government's position concerning the numerous independent 8(a)(1) allegations. Apparently the Charging Party assumed that the General Counsel would do a better job in this regard, for it specifically relies on the General Counsel's "representations and arguments" on this issues. It is true that the General Counsel's narrative discussion imputes conduct to management representatives which might be viewed as incompatible with Sec. 7 guarantees. However, little attempt has been made to isolate these references to any definable unfair labor practice, and, certainly, no attempt is made to put forth rationale as to why, how, or under what line of thinking, the allegations should be sustained. This "scattershot" technique is inexcusable. No one knows better than the General Counsel just what evidence, theories, and precedent support the violations where a complaint incorporates multiple counts of Sec. 8(a)(1). The administrative process could be benefitted through the simple task of passing this information on so that the General Counsel's position might be understood, and the 8(a)(1) allegations resolved under conditions minimizing confusion, delay, and opportunity for error. While can appreciate that no party has an obligation to file a brief, there also is no rule obligating a litigant to make an effective presentation.

view that, in context, the inquiry as to the applicants' preferences would have no tendency to impede protected rights. Earlier, the jobseekers, who were accompanied by Local 292 business representatives, and who obviously were acting jointly to further institutional designs, had completed applications which, according to the General Counsel's own argument, contained information clearly disclosing a history of union employment at union scale. It was this, and only this willful disclosure, which served to invite Buelow's response. Against this background, it strains credulity to assume that any among this group would have sensed any degree of pressure from an attempt to clarify their preference for union or nonunion work. *Rossmore House*, 269 NLRB 1176 (1984).

The complaint also alleged that Buelow, still at the Embassy Suites violated Section 8(a)(1) by telling applicants that they would be employed "only at union projects and . . . not . . . at nonunion projects."[32] This allegation is apparently based on testimony of Priem and Hansen. Priem describes Buelow as stating that Ameristaff had union and nonunion work and that the applications taken at the Embassy Suites would be placed on file until the union work came in. Priem's prehearing affidavit reflects that after he asked Buelow what would happen to the applications, the latter simply replied that they would be filed "for future job opportunities." To this Priem replied, "I think I know what file they will go into." Thus, the affidavit omits the union/nonunion dichotomy. (R. Exh. 2.) As was true there, Priem's account given at the hearing plainly amounted to his interpretation of Buelow's remarks, rather than what was actually said.

Hansen testified that Buelow stated:

> [T]he contractor that we are now working with now is for nonunion jobs. There will be union work coming in later. We will keep your applications on file for a later date.

The two versions are not perfectly consistent, and in my opinion Hansen's is too vague to support a violation. The differences, together with my lack of complete confidence in Hansen and Priem, lead me to

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[32] The failure to brief the 8(a)(1) allegations in meaningful fashion has produced an esoteric game of mix and match. The degree of guesswork involved is suggested by the General Counsel's abstract comment that the remark covered by this allegation constitutes an unlawful "promise."

give the Respondents benefit of the doubt and the 8(a)(1) allegation in this respect is dismissed.

(b) *By Ron Sager*

The complaint alleged that the Respondents violated Section 8(a)(1) of the Act by several remarks attributed to Ron Sager at the Embassy Suites. The first involves a comment, somewhat identical to that attributed to Buelow, that those without appointments would be placed in a file for employment at union projects and would not be considered for employment on nonunion jobs. The General Counsel's brief does not mention any testimony which would be relevant to this allegation. Yet, no attempt is made to delete it. Apparently, it was more convenient to defer this allegation to the administrative law judge. After an independent study of the record, no evidence has been located which might tend to substantiate this allegation and it is dismissed.

The complaint also alleges that Sager expressed a threat that "he could not hire . . . members of a union because his customers would not allow it." The General Counsel does not specify the testimony relied on to support this allegation. My own culling of the record suggests that the allegation might pertain to testimony by three different witnesses to three distinct incidents.

The first derives from a colloquy between Priem and counsel for the General Counsel, as follows:

> Q. Was anything said about the customer during Ron Sager's remarks when he came into the room?
>
> A. Yes. *They* had stated to us that we can't hire signatory people as per our customer on this project. [Emphasis added.]

No attempt was made at the hearing to clarify that it was Sager who made the statement. In any event, if made, others would have been within earshot and I am unwilling to accept Priem's uncorroborated testimony in this respect.

A second possibility emerges from testimony by Craig Jones, who relates that, during his interview, he asked whether T & C had considered working union, and was told by Sager that they would "not be signatory to any union and that basically their customers preferred it that way." Sager could not recall making these statements. In crediting Jones, his account merely expresses a customer preference for nonunion contractors, rather than an absolute ban, and hence the statement is considered fair argumentation within the purview of Section 8(c).

The third derives from Hansen's employment interview. He claims that, in the course thereof, Sager said, "Well, you know, our customer up there is . . . Boise Cascade. . . . We can't have any signatory employees up there." "Our customer, Boise Cascade, will not allow it." Sager denied any such remarks. Defferding could not recall any conversation to the effect that they couldn't have union signatory people at Boise Cascade, or that Boise Cascade, wouldn't allow such employees into the plant. As indicated below, I believed Sager over Hansen, in connection with coercive comments the latter attributed to Sager during his employment interview. Accordingly, any 8(a)(1) allegation based on this incident is dismissed.[38]

[38] Recently, the Board appears to have hesitated over possible 8(c) protection for antiunion argumentation founded on customer preferences. See *Harrison Steel Castings*, 293 NLRB 1158 (1989). The General Counsel, having failed to analyze the issue, or cite any authority whatever, again, in context of a debatable issue, has dumped its own responsibility as an adversary on the administrative law judge.

The complaint also alleges 8(a)(1) allegations on grounds that Sager:

> (i) threatened that "an applicant for employment would be required to resign membership if hired," while questioning the applicant as to whether he would comply, and (ii) threatened that an "applicant could not discuss unions or organize on behalf of unions at the Boise Cascade site."

These allegations presumably are predicated on testimony of Hansen as to what transpired during his interview at the Embassy Suites. Hansen's version, in material part, is as follows:

> Well, they called me in there and they said, "Well, we know you are a union member." I said, "Yes, I've been a union member for 28 years." And then we talked about the job up there and what it consisted of, and Mr. Sager asked me . . . so I went through basically my work experience since 1956.
>
> I think then Denny Defferding went into that he was once a union member and that any people they hire, once they hired them, they expect them to drop their union membership, and Denny Defferding asked me if I would be willing to do that, and I responded with "whatever."
>
> Ron Sager was very emphatic that there would be no talk about union, no organizing. He said

> we could talk about fishing, hunting, women, but there will be no talk about the union in any shape or form.

After a break in the interview, Hansen returned and was hired. He claims that Sager stated at that time, as follows:

> We've got to trust each other. We've got to be confident [sic]. We don't have to tell what we know. "In fact there is two people out there in the hall. I imagine they are waiting for you. I imagine they are union members. Don't tell them anything. . . . You don't have to." I asked him, I said, "Well, when will I be getting this vacation and hospitalization and all that you offered?" Well, he said, "As soon as you and I can agree on that you are coming to Town & Country permanent and you drop your union membership, you will receive all those benefits."

Sager testified that during the first interview, Hansen volunteered that he was trained by and a member of the IBEW. He denied that either he or Defferding inquired as to his union status. Sager denied any statement that Hansen had to drop his union membership before getting on T & C's payroll. He denied that anything was said at that time concerning Hansen's right to discuss the union on or off the job at Boise Cascade, nor was his right to engage in organization activity discussed.

Defferding, when asked if he had questioned Hansen about the Union, stated: "I don't remember asking the question, I just remember it came up. I believe he volunteered it because we had no problem with

it." [34] Defferding testified that, once disclosed, the only comment concerning Hansen's membership pertained to whether, as a union affiliate, he had any problem accepting employment with a "merit shop" because others who did so, later were exposed to threats. Defferding denied that anything was said concerning trust and confidentiality. He also denied that Hansen would be required to drop union membership before going on T & C's payroll. He denied that Hansen was told that he could not organize on that job, or that their were limitations on his right to do so.

Neither Hansen, Sager, nor Defferding impressed as impeccable witnesses. In many areas, I would prefer Hansen over defense witnesses, including Sager and Defferding. However, in this instance, T & C is given benefit of the doubt. Hansen was given a job out of Respondent's desperation, with knowledge of his union history. Prior to his interview, Sager and Defferding were alerted to a possible union attempt to infiltrate the hiring process, and, between interviews, Hansen was observed cavorting with his union "bud-

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[34] Defferding was, perhaps, the least impressive witness. There are many reasons why I have great difficulty entertaining the notion that T & C was indifferent to union affiliation. For reasons already given, I have difficulty accepting that T & C operatives were unaware of the content of Ameristaff's screening process. Moreover, prior to this interview, Buelow reported that the presence of union members might well constitute a threat to the recruitment process, a development which would arouse strong curiosity as to possible involvement of those yet to be interviewed. The suggestion by Defferding that T & C was indifferent to union allegiances hardly enhances his credulity in this proceeding.

dies."[35] In this light, probability leads me to believe the testimony that T & C would have finessed the union issue, rather than address it with the heavy-handedness suggested by Hansen. On the basis of Sager's credited denials, the 8(a)(1) allegations emerging from this interview are dismissed.

3. The termination of Hansen

a. *Overview*

The second major combination of allegations relates to the employment of Hansen, who had been a member

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[35] Hansen's interview was conducted in two parts. Defferding testified that, during the interval between those meetings, he observed Hansen talking with his union "buddies." He claims that, for this reason, when Hansen returned, Defferding asked: "are they giving you a hard time because you are considering working for us[?]" Thus, Defferding claims to have assumed that ill will was blowing between Hansen and other applicants. This is incredulous. Hansen at the time had not been offered a job. Like, Hansen, his union "buddies" were present in quest of jobs. That Defferding could have read conflict between Hansen and any of the applicants is pure nonsense. I am convinced that Defferding's concern stood on more pragmatic grounds. Before treating with Hansen, Defferding and others on the interview team had been alerted to union intervention in connection with the manning of this job. Being sensitive to union attitudes toward "merit shop" contractors (C.P. Exh. 1), the dynamics of what had already transpired would lead Defferding to a single concern; namely, that Hansen was in league with other union members present on that occasion. In contrast with Defferding's testimony, it is more likely that he would assume that Hansen was part of the conspiracy, and that he was hired out of desperation, on hope that he could be controlled.

of Local 292 for 28 years and a licensed electrician for about 18 years. He was not a paid union organizer, and apparently did not serve the Union in any official capacity. As indicated above, he was hired with knowledge of his union history as the last to be interviewed, and the only licensed electrician secured through Ameristaff's Embassy Suites venture. Sager testified that they elected to give Hansen, who allegedly stated that he had a master's license,[36] an opportunity to work. Hansen accepted at $15 hourly and $25 daily per diem.

Though interviewed and selected for hire by T & C officials, technically, Hansen was retained on Ameristaff's payroll for referral to T & C's Boise-Cascade job. (G.C. Exh. 5(b).) He worked on September 12-14. On this latter date, he was terminated when T & C cancelled its contract with Ameristaff, while declining to place Hansen on its payroll.[37]

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[36] I credit Hansen's denial that he claimed master's status. Sager testified that in Wisconsin, it was not unusual to find one with a master's license willing to work for $16 hourly. Consistent therewith, Defferding testified that Hansen was given T & C's $16 rate for master electricians at the interview. This is inconsistent with the $15 rate documented in G.C. Exh. 5(b), the employment contract between Hansen and Ameristaff. Moreover, Buelow corroborates that Hansen was initially assigned a $15 rate, that was later increased to $16, the rate reflected in Hansen's paycheck. It is also noted that in his employment application, dated September 7, Hansen fails to represent that he held a master's license. G.C. Exh. 5(b).

[37] By letter of that date, the Union notified T & C that Hansen was a member of Local 292. G.C. Exh. 5(a). The return receipt reflects that it was not delivered to T & C until September 21. R. Exh. 3. T & C replied to the Union by letter of September 21, denying that Hansen had ever been employed

As indicated above, Ameristaff's relationship with Hansen appeared to be a paper transaction, with T & C providing sole supervision, and Ameristaff having no discretionary role in his discharge. T & C's key players in the elimination of Hansen were Sager, Defferding, and Rodney Smithback, T & C's project superintendent. However, Smithback was the sole T & C functionary with day-to-day supervisory authority at the Boise-Cascade site. His testimony, with support from T & C employees Randy Reinders, Tom Steiner, and Michael Grow, is critical to the effort on the part of the defense to impeach Hansen's performance on that job, so as to confirm that union considerations where [*sic*] not involved.

The General Counsel's contention that Hansen was terminated on proscribed grounds centers on undisputed testimony that, during his brief 3-day tenure, Hansen flaunted his union membership, while engaging in overt, repetitive efforts to organize coworkers. Before announcing his intentions in that regard, T & C, on Tuesday, September 12, increased his wages and per diem. He was gone 2 days later.

Under the complaint, the organizational activity had a contumacious flair, since manifested by Hansen in the face of alleged instructions that he cease all union activity. These instructions are among a series of independent 8(a)(1) allegations naming Smithback as having told Hansen not to discuss the Union on the job, on the jobsite, or off the job; as having threatened discharge for organizing on the jobsite, and as having questioned Hansen as to what it would

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by it, naming Ameristaff as his employer. The letter is cumulative as Hansen's union sympathy, and T & C's knowledge thereof is a given.

take to get him to quit discussing unions and to support the Company. The General Counsel implicates Ron Sager in this coercive pattern through allegation that he too prohibited Hansen from discussing or engaging in union activity.

b. *Hansen's employment at Boise Cascade*

On Friday, September 8, Hansen called T & C, speaking with Sager. He at that time was given directions to the "Arrowhead Lodge" in International Falls.[38]

T & C's onsite personnel at Boise Cascade during Hansen's tenure was limited to Project Superintendent Smithback, Tom Steiner, a 25-year-old apprentice, who had never worked outside of Wisconsin for T & C, Randy Reinders, a 29-year-old journeyman electrician unlicensed in Minnesota, and Mike Grow, a helper on T & C's payroll. Much of the testimony focused on Hansen's 3-day tenure, with the General Counsel

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[38] Smithback testified that he actually gave the directions to Hansen on this date, while telling him that he would have to provide, "on his own," safety glasses with side shields, hard hat, and safety shoes. He adds that at a safety meeting on Monday, September 11, attended by Hansen, the Boise-Cascade requirement that these items be worn at all times was mentioned repeatedly. Defferding testified that, when hired, Hansen was told that he was required to wear steel-toed shoes. It is a fact that Hansen did not arrive at the jobsite with safety shoes, and circumstances precluded his obtaining them until his last day on the job. In contrast with Smithback and Defferding, Hansen testified that before reporting, he was told to bring his tools and a hammer drill if he had one, but not safety shoes. Although the testimony dealt with Hansen's compliance with safety standards, Sager admitted that this did not contribute to T & C's decision not to place Hansen on its payroll.

stressing his union activity and the Respondent's reaction thereto, and T & C attempting to discredit Hansen's competence as well as performance during this period. My findings in this connection are summarized below.

Tuesday, September 12. This was T & C's first day on the job. According to Smithback, the crew arrived later than intended. After the unloading of tools, another delay was encountered because Boise Cascade had not laid out the materials as promised.

Around noon, State Inspectors Bob Johnsen and Gordon Oslin met with Smithback in the crew's presence.[39] Smithback was informed by the inspectors that T & C was in violation of Minnesota restriction on crew ratios. Thus, in addition to Smithback, there were three T & C employees, plus Hansen on the job. This offended Minnesota law by exceeding the required ratio of licensed to unlicensed personnel. Johnsen stated that because Hansen was the only licensed journeyman, two others would have to be removed. To comply, Smithback agreed that he would perform no electrical work, while electing to remove Mike Grow.

A dispute exists as to whether the investigators were informed that Hansen was employed by a Ameristaff and not by T & C. Thus, T & C's witnesses claim that Hansen reported this at that time. For

[39] Smithback testified that he was involved in a meeting and when he returned to the work area "around noon or shortly after," he was notified that the inspectors were present. Tom Steiner apparently did not agree. He described a great deal of work as having been performed prior to the arrival of the inspectors. He claims that they did not appear until late afternoon.

example, according to Smithback, Hansen told the investigators:

> I don't think that Town and Country is legally working because I don't work for them. I work for a temporary company Ameristaff and I don't think they can be here doing that.[40]

In response, Johnsen, according to Smithback, indicated that the inspectors were not sure of the ruling covering that situation, and therefore would let the job progress, but that the circumstances were strange and the job would be watched closely.

Hansen denied having mentioned Ameristaff at that time. In fact he asserts that Smithback described him to the inspectors as an employee of T & C. Inspector Johnsen, an apparently disinterested witness, corroborated Hansen. He testified that Smithback identified himself as the T & C representative on the job, and that when Johnsen inquired as to whether those on the job, including two apprentices, were his employees, Smithback responded, "Yes, they are. Mr. Malcolm Hansen is the journeyman in our employment." Contrary to T & C's witnesses,[41] Johnsen de-

[40] Mike Grow, Randy Reinders, and Tom Steiner would later corroborate Smithback in this regard. Steiner testified that Smithback said he would check to confirm Hansen's position re Ameristaff. Grow, Reinders, and Steiner, virtually at every turn, offered choral corroboration of Smithback's testimony. The improbability of their testimony at this juncture foreshadows inherently questionable accounts in other significant areas. I considered them to be thoroughly unconvincing.

[41] Smithback and Mike Grow denied telling the inspectors that Hansen was employed by T & C. Reinders testified that Smithback told the inspectors that Hansen was employed by Ameristaff.

nied that Hansen referred to his employment with Ameristaff at that time.[42]

On departure of the inspectors, Hansen advised Smithback as follows:

> Well, it looks like I'm pretty important guy on the job right now. If only two people can work and it's going to be on my license under my direction, looks like should have a little more money.

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[42] I credit Hansen and Johnsen. Apart from the latter's disinterest, I find support for their accounts in testimony by Sager that he did not learn that there was a question concerning the use of "temporary" or third party employees on the Boise-Cascade job until much later when he received a message from Robert C. Stephenson, T & C's vice president. However, Sager and Smithback confirm that they participated in a telephone conversation on the heels of the conference with the inspectors. If the agency issue had been broached to the inspectors, Smithback certainly would have been mentioned this to Sager. If Hansen was right, Ameristaff's involvement was far more critical than other topics discussed with the inspectors. In that event, T & C would have to terminate operations until a qualified journeyman could be hired and placed on its payroll. I also have doubts that, if aware of Ameristaff's involvement, the inspectors, as Smithback indicates, would not have known its legal ramifications. John Quinn, the executive secretary of the Minnesota State Board of Electricity, testified, without contradiction, that he informed Stephenson on September 11, that he had "advance notice" that T & C planned on hiring through an employment agency, and that Stephenson was informed that this arrangement would be unacceptable. Smithback's testimony that the inspectors were not of a similar mind assumes a possible, but unlikely lack of communication between electrical board headquarters and the electrical board's field personnel. It is more likely that, as Johnsen testified, Hansen was identified as a T & C employee, thus obviating discussion of the agency issue.

Smithback then apparently contacted Sager, who in turn spoke with Hansen. According to Hansen in their ensuing conversation, he sought an increase and eventually settled on an offer of $17 hourly and an increase in per diem to $32. With the exception of the size of the increase, Sager does not seriously dispute the content of this conversation.

Later that day, during break, Steiner asked Hansen how much he was making on the job. Hansen told him that he earned more than Smithback, also informing Steiner that "at home," he customarily earned $25.70 an hour. In response, Steiner asked what Hansen was doing at International Falls. Hansen stated that he could not disclose at that time, but would tell him before leaving the job.[43] According to Hansen, Smithback who heard and was unhappy with Hansen's remarks, allegedly instructed: "I don't want you talking about unions on the job, at the cabin or anything. I don't want Steiner and Reinders to hear it. I just

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[43] Steiner testified that the only time Hansen mentioned his earnings was when he said that "he was making more than T & C was giving him." When Steiner asked how much, Hansen declined to tell him. Steiner was a thoroughly unreliable witness, whose testimony struck as a pat, finely honed attempt to place meat on the bones of Respondent's case, whenever he could and with repeated exaggeration and disregard for truth. Reinders testified that the only reference to wages that he was aware of grew from Hansen's discussion of differences between his earnings on union jobs and at Boise Cascade. As for Grow, on his inquiry as to how Hansen could afford to lose money by working for T & C, Hansen denied that this was the case, indicating that his hourly rate was being subsidized by the Union. I believed Hansen in this respect.

don't want to hear it. That's it." Hansen stated that he would not comply.[44]

Sager testified that on the afternoon of September 12, he received a call from Smithback who was unhappy with the fact that Hansen was telling the other workers on the job that he earned more than Smithback. Sager suggested that the latter call Defferding, while indicating that he should avoid upsetting Hansen because he was needed. Sager added that Hansen had a gun at their head, requiring respect for his demands.

On September 12, the curtain was lifted on the attempt by T & C's witnesses to portray Hansen as a poor worker, who failed to demonstrate that he possessed craftsmenlike skills. Smithback admitted that he had no direct opportunity to evaluate Hansen's work that day. He did testify, however, that he was "a little surprised at the amount of work that they didn't get done on the 12th." [45] He added that:

> [B]oth Tom Steiner and Randy Reinders came up to me and asked me specifically if I could find something for Mick to do, so they could get some

[44] In this instance, I believe that Hansen was mistaken. Although I have no doubt that such a remark was made by Smithback during Hansen's employment, Tuesday was a bit early. It was not until Wednesday that Hansen announced his intention to organize. Prior to that, his references to union activity were general, oblique, and ambiguous, and in the circumstances would not have prompted the strong admonition attributed to Smithback.

[45] In the face of Smithback's admission as to the late start that morning, it is of interest that Reinders testified that after the inspectors left, not much work got done because of the dialogue that ensued in consequence of Hansen's claims for more money and authority based on the licensing problem.

> work done. He was interrupting them, consistently talking, would not allow them to proceed in a fashion to which they were accustom to working.
>
> [A]s they set up a scaffold, placed pipe on it and then were about to take clamps to the top of the scaffold with them . . . and then proceed to run the conduit[,] . . . Mick would not allow them to take the clamps up because then he would have nothing to do [if] he couldn't throw the clamps up to them.
>
> So he took essentially a two man job and made it into a three man job and in the process—they complained about he talked an awful lot.

Steiner's testimony was more far reaching than Smithback's summation. His criticism appeared to highlight malfeasance, rather than nonfeasance. He testified that, together with Reinders, on Tuesday, he was running conduit, above ground on scaffolding, as Hansen, at ground level bent pipe for them. When asked to evaluate Hansen's work in that regard, Steiner stated that he could have done a better job as Hansen's bends were not in accord with measurements, and had skewed angulation. Steiner claims that he rebent some of the pipe. Steiner also testified that an offset made by Hansen was not right, and that from his observation, Hansen lacked familiarity with the machine, a conclusion deduced from his use of angulation charts to discern multipliers used to effect bends of different degrees.

Steiner also testified that the crew was cutting strut, a "U" shaped channel to be anchored to a wall designed to hold conduit. Steiner asserts that the cuts, made on the portaband saw, were not straight,

and that most of the cutting was performed by Hansen. He also claims that he observed Hansen, rocking the band saw, a practice which could break the blades, and instructed him as to the proper technique. With Hansen being the primary operator of the band saw, they went through six blades in 3 days. In addition, Hansen and Steiner had to recut struts.

Steiner testified that late in the day, the crew resumed hanging strut on the wall. He had Hansen cut a strut for a "disconnect" which ended up shorter than the measurements Steiner had provided. Reinders confirmed that this short length was pursuant to a measurement originally made by Steiner, then remeasured by Hansen.[46]

If Steiner is to be believed blades were not the only tools ruined by Hansen that day. He related that the latter in drilling holes in the struts, spurned the use of a "center punch" as a starter, using a larger bit, forcing the drill, at high speeds, directly on the metal. This allegedly caused the drill bits to dull rapidly. Hansen allegedly burned up every available drill bit by the end of the first day.[47]

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[46] The attack on Hansen's competence included reference to the latter's position that bent conduit was subject to appropriate measure either on a top-to-top or bottom-to-bottom basis. Steiner with initial agreement from Reinders stated that this was in error as the accurate measurement could only be made from top to top. Reinders, on cross-examination was forced to concede that it made no difference, as the top would become the bottom simply by turning the offset pipe upside down.

[47] Reinders claims that he attempted on Tuesday to correct Hansen's method of handling the drill. Hansen, however, denied this, pointing out that it was his practice, and for years, had carried his own personal drill bit for use on this, and all other jobs on which he was employed.

Steiner did confirm that, among the above-described tasks performed by Hansen that day, he insisted on feeding clamps to Steiner and Reinders as they worked on the scaffolding. The box of clamps were not placed on the scaffolding before hand, because, precisely as Smithback had related, Hansen needed something to do.[48] When examined further on this point, Steiner offered that Hansen really preferred this task to other work that he might have done. Steiner ultimately agreed that the accumulation of too many parts and tools on scaffolding would tend to create a safety hazard.

Reinders also spoke to Smithback that day, reporting that the drill bits were shot, and that they had broken so many band saw blades that only one remained. In fact, Mike Grow was sent to the hardware store to purchase additional blades that Tuesday afternoon. On cross-examination, he admitted that two portabands were on the job and that both were used regularly, frequently and by "everybody."

Smithback testified that he called headquarters late in the day to report that he was not pleased with Hansen's performance and that he was not meeting expectations as "he was unsatisfactory, his performance was unsatisfactory." Smithback claims that, on September 12, he made an entry on the daily foreman's diary citing Hansen with work that "does not come close to being satisfactory in the production

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[48] As noted in T & C's posthearing brief, Hansen, in addition to feeding the clamps, would pass conduit to the men as they worked on the scaffolding, and move it for them as their work progressed.

end." There was no reference to damaged materials, tools, or parts. (R. Exh. 12(a).)[49]

Wednesday, September 13. Apart from the assault on Hansen's competence, testimony as to events of this day includes Hansen's account concerning the emergence of the Ameristaff issue and evidence that this was the first occasion on which Hansen announced specifically his aims on behalf of the IBEW.

First, Hansen testified that in the morning, Area Inspector Gosland approached him on the jobsite requesting that he identify his employer. Hansen, in Smithback's presence, replied: "Well, I'm not positive who I work for. I filled out an application with Ameristaff, but I'm working with the guys here from Town & Country and I use Town & Country's tools and Town & Country employees are . . . working off my license." According to Hansen, Smithback in-

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[49] Smithback relates that were it not for the licensing problem, Hansen would have removed from the job at this point. This is taken as a remarkably strong statement after only a partial days work and by one who claimed no opportunity directly to observe Hansen. Moreover, the diary entry itself is questionable. It appears inappropriately placed, lending support to the possibility that it was entered after the fact, as argued by proponents of the complaint. In any event, the entry makes no reference to the quality of Hansen's performance. This omission is striking when considered in light of Steiner and Reinders' accounts of destroyed drill bits and saw blades due to poor work practices, as well as his alleged output of fouled parts, requiring partial rework. Consistent with Tuesday's variance, entries in the diary for the balance of that week dwell exclusively on productivity, with not a single mention of Hansen's failure to perform in a workmanlike manner.

formed Gosland that Hansen was working for T&C.[50]

Later, during an afternoon break, Hansen announced, for the first time, that he was on the project to organize for the Union. Smithback, Steiner, and Reinders were present. According to Hansen, at that point, Smithback leaped to his feet, stating, "Jesus Christ, I don't need that. I don't want you talking about unions anymore. I got to call the office and talk to Ron Sager." Smithback then went into the office. Smithback admits that Hansen made this announcement, but he testified to saying nothing before seeking guidance from headquarters.

According to Hansen, Smithback later returned, advising Hansen, in the presence of Steiner and two Boise Cascade employees (Everett Hall and Dennis Moran) as follows:

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[50] According to Sager, he did not learn that there was a question concerning the use of temporary employees on the Boise-Cascade job until Tuesday, following the pay raise conversation with Hansen. The source was a cryptic message from Bob Stephenson. Sager first places this as having occurred that "morning," but later would testify that this message was not received until 4:30 p.m. In this connection, it is noteworthy that John Quinn, the state electrical official, testified that when, on September 11, he instructed Stephenson not to use a labor service, Stephenson indicated that adherence would be no problem. Quinn added that, in his presence, Stephenson telephoned his office, overhearing Stephenson instruct that "they could not use an employment service for contract labor, and that should be taken care of." (This was memorialized by Quinn's letter to Stephenson dated October 18. G.C. Exh. 12.) According to Sager, he did not actually talk to Stephenson until Wednesday, September 13, whereupon Stephenson reported that Quinn had advised that they could not use temporary employees on any jobsite in Minnesota.

> I just talked to Ron Sager over at Appleton, and I don't want you talking about the union. Ron Sager doesn't want you talking about the union. Boise Cascade doesn't want you talking about the union, and if you don't quit talking about the union, I'm going to fire you.

Hansen replied, "That could be, but I'm not going to stop talking about the Union."

Sager concedes that at some point that day, Smithback called, reporting that Hansen was engaged in union activity. Sager claims that he instructed Smithback that he could not restrict Hansen from doing this on his own time, but, if while working, he is talking to excess on any topic, Smithback was free to appeal for a little less talk and a little more work.

Consistent therewith, Smithback testified that he then approached Hansen telling him "please talk less and do more work."

Parenthetically, it is noted that Sager relates that he had received an earlier phone call that morning from Smithback who reported that Hansen was wandering around and not being very productive. Sager told Smithback that at this point they had to make decisions at headquarters, and for him to just keep his eye on the situation. Smithback averred that he was told in that conversation "there's not a lot you can do." He claims that they asked if Hansen was working steady, whereupon Smithback replied, 'No, he talks a lot." [51] Smithback states that

[51] If Smithback had made the report he claims to have made on Tuesday evening, this exchange would have been old news and repetitive.

he was told that all he could do "is ask him to talk less and work more." However, Smithback claims that he was admonished that Hansen could talk about anything he wished as long as it doesn't interfere with the work.

According to Hansen, at Smithback's urging, he telephoned Sager, who allegedly stated:

> I don't want you talking about the union. . . . Boise Cascade won't allow us to talk about the union. I don't want you talking about it. I don't want you talking about anything but the job. I don't want you talking about church. I don't want you talking about gambling. I don't want you talking about anything but work. Now go get Smithback and tell him to call me.

Sager agrees that this conversation took place. He claims, however, that he informed Hansen that Smithback had reported that his productivity was under question and that he didn't have safety shoes as required. An incident involving a hard hat was also mentioned. Hansen allegedly grew angry, hanging up the phone.[52]

Of major significance to the above conflict is a concession by Sager that on either Wednesday or Thursday, or both, he possibly had two conversations with Hansen concerning Hansen's declaration: "I'm going to not stop talking about the union." [53] Sager alleges that he reacted as follows:

[52] Here again, the criticism did not include references to the broken tools and scrapped parts, or the basic charge of "poor workmanship" attributed to Hansen by Steiner and Reinders.

[53] Smithback testified that Hansen had also made a comment to him on Thursday morning suggesting that Hansen

> I don't care what you talk about as long as it's on your own personal time, if it interferes with your work, that's another story . . . you can talk about anything you want . . . on your breaks, your noon hours, your own personal time before work, after work, at the lodge, whatever, but you can't talk about it on your work time, if it interferes with your work. . . . same way if you were talking about baseball or hunting or fishing, religion, politics, telling a joke whatever.

The General Counsel in this respect raises the question as to why Hansen would repeatedly assert his intention to persist in union activity, if Sager and Smithback's constraints did not extend beyond the project and did not reach nonworking time. After all, Hansen lived, slept, ate, drove to and from work with T & C's employees and had ample access to them. Sager's admission concerning Hansen's expressed intention to pursue organization is more compatible with the total restraint, then the limited one suggested in his own, and the testimony of Smithback.

In a further incident, as the men were returning from work that day, Hansen relates that Smithback, in presence of either Steiner or Reinders, complimented his work, asking him how much it would take to get him to "jump ship and come over to our side." When asked what he meant by that, Smith-

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was under the impression that he was subject to a broad ban on union activity. Thus, he testified that, at that time, Hansen asked where Smithback got the idea that the Union could not be discussed on mill property.

back said, "Get up off your union activity and come to work for us." Hansen grinned and said, "I don't think you have enough money." When they arrived at the cabin, Smithback repeated that Hansen was not to discuss the Union as he was tired of hearing it and did not want the others to hear it.

In addition to denying all 8(a)(1) conduct attributed to him by the complaint, Smithback was sharply critical of Hansen's performance this day. First he states that his other electricians complained that Hansen was rough with the manual and power tools. In one instance, Tom Steiner accused Hansen of breaking five blades on a portable band saw due to improper use. He allegedly broke most of the drill bits T & C had at the site. Smithback claims that he personally observed Hansen reject proper practice by using a hammer to bang a piece of pipe into a clamp on a "rigid 300 mule machine."

In addition to the foregoing, Smithback states that:

> Throughout the day on Wednesday I did notice that he was speaking with people an extraordinary large amount of time. He tended to have coffee with the [T & C] crew and then coffee with the mill crew and he would talk to the guys and in his way [of] talking his personality would be forceful enough, he would more or less make it hard to work while he was talking to you.
>
> . . . .
>
> The rest of the guys were upset with the amount of productivity they had gotten done too, meaning Randy and Tom, because Mike was not present. They were both saying, "Man, we

> should have been farther than this, we just can't get anything done. Everything Mick cuts he cuts crooked." They had to recut, rebend, redo, most everything he had done and—okay, he was talking Wednesday morning when I came in and Randy Reinders believe asked me a question about . . . how we were going to do it . . . and we were discussing what was to be done . . . and Mick came storming up and yelled at me "I thought we made it perfectly clear that I'm in charge of this group and that if you want to talk to anybody who's working, Randy or Tom, I had to talk through Mick," I could not talk to the guys on the crew.

Smithback summed up by stating:

> On Wednesday, [Hansen's] performance was negligible, didn't really do much of anything but talk to people and disappear from the immediate site . . . for periods of time.

Steiner was pretty much in tune with Smithback in criticizing Hansen's performance on Wednesday. He avers that he, Reinders, and Hansen were installing struts, but that Hansen did not get a lot done, because he was talking to them about the Union. This, according to Steiner was irritating, distracting them from performing while listening to Hansen. Steiner also testified to another occasion when Hansen delayed his response to a request for help because engrossed in conversation with Boise Cascade employees. In broader terms, Steiner explained:

> He wasn't there most of the time on Wedensday, I wouldn't say most of the time, but he wasn't there a lot of times, he was either going to the

> bathroom—in fact one time Randy [Reinders] had gone to the bathroom and came back and I had to ask him if he had seen Malcolm and he said "no." And then we were waiting and waiting for him to com[e] back and then he came back and I guess he was talking to somebody from another . . . [contractor] or something like that.

Steiner also testified that on Wednesday morning, Smithback was apprised of Hansen's having broken drill bits, and therefore, in addition to his talking about the Union, and his absence from the work area, Smithback was alerted to specific allegations that would plainly demonstrate Hansen's faulty workmanship.

Reinders was also called to comment on Hansen's performance on Wedensday. Like Steiner, he accused Hansen of sitting around talking a lot that day with employees of Boise Cascade and other contractors on the job. His summary of this observation shows a remarkable resemblance to the testimony of Steiner:

> On Wednesday, [Hansen's] performance was negligible, didn't really do much of anything but talk to people and disappear from the immediate site . . . for periods of time.

The subject of these conversations, according to Reinders, was union. Moreover, their disruptive effects was suggested by Reinders' testimony that he had to beckon Hansen to return to assist other members of the crew, and according to Reinders, Hansen performed work-related tasks only about 5 hours that day. He claims that he reported this, including the fact that unionization was among the topics, to Smithback, who attempted to correct Hansen merely

by telling him "he'd like to see a little more work and less talk." [54] According to Reinders, nothing else was said by Smithback.

Reinders would broaden the allegations of broken tools and parts to include Hansen's culpability in connection with the disabling of the "300 threading machine." Thus, Reinders testified that on Wednesday, Hansen was operating the 300 threading machine, when it became disabled. The damage to the machine caused misalignment of the teeth, which cut threading into the pipe. According to Smithback, on that very day, he personally observed Hansen hammering the jaws of the machine tight, instead of making the adjustment by hand.[55] This allegedly caused improper threading by tearing metal chunks from the machine, again causing rework. Reinders

[54] Reinders, who like the rest of T & C's witnesses struck as heavily biased and totally lacking in objectivity, first corrected himself when he initially placed this appeal on Wednesday, then twice stated that it occurred on Thursday morning. Apparently dissatisfied with this response, T & C's counsel inquired a third time. Apparently, Reinders got the message, for this time he went back to Wednesday, relating that these very words were used by Smithback to Hansen at that time.

[55] Reinders was less sure of the cause, and apparently did not observe Hansen take a hammer to the unit. When questioned as to the cause, he speculated: "Maybe the way he was forcing on the handle to get it started on the pipe might have had something to do with it." The "maybe" became accusation when Reinders clarified that Hansen was leaning into the handle, an unnecessary and improper way to operate that machine. However, on cross-examination, Reinders admitted that he did not know when the teeth broke off, and to further confuse his speculation, conceded that others had used the "300 threader" that week.

admits that Hansen fixed the machine himself, an effort which took a considerable amount of time.[56]

T & C's posthearing brief includes a representation that on Wednesday, Steiner and Reinders reported their observations concerning Hansen's performance to Smithback. In his log for that day, Smithback simply stated:

> Malcolm Hansen is a prolific talker. I wish I could channel the energy he puts into talking into productive work. All of his talking is slowing down the job.[57]

Sager testified that he believed that on Wednesday, September 13, he called Buelow to report that Hansen was being evaluated for productivity and safety

[56] Hansen's problems on the "300 threader" apparently did not end on Wednesday. Steiner testified that on Thursday, Hansen was engaged on that machine cutting and threading short pieces of conduit for installation. The next day, after Hansen's departure, Steiner discovered that the conduit was cut to improper lengths and not properly threaded. Smithback claims that he learned on Thursday that, in preparing a particular component, Hansen was guilty of improper spacing of pipe connectors while cutting pipe of such erratic lengths as to require that some be redone. This went unmentioned in his diary for that day. Furthermore, it is my understanding from Smithback's testimony that this dereliction, if true, would not have been discovered until after Hansen's termination.

[57] The Respondent asserts that because Smithback had been told by Hansen, following the inspectors' visit that Hansen was in charge, Smithback did not discuss these deficiencies with Hansen. However, this so-called "licensing problem" did not prevent Smithback from admonishing Hansen to work more and talk less. Nor would this excuse his failure to list in the foreman's diary, the litany of other, more major offenses, which according to T & C, bordered on willful sabotage.

violations. Buelow testified that the only reason given him concerning termination of Hansen was T & C's inability to use Ameristaff or a temporary contractor. In any event of major concern, is the fact that Sager himself does not list faulty workmanship as among Hansen's alleged failings, an omission which consistently reemerges in documentation, and reasons expressed by Sager and Defferding for Hansen's demise.

Thursday, September 14. Hansen's final workday was highlighted by two incidents, the first occurring during the ride to work that morning, and the second during the noontime break. Several 8(a)(1) allegations are imputed to Smithback during these episodes, and an assertion by T & C that Hansen had caused "disharmony" within the crew, an important link in reconstructing the motive for the termination also appears to have found its genesis that day.

Hansen's union activity on Thursday opened that morning at the plant gates when Smithback's vehicle was confronted by pickets.[58] Hansen emerged from the truck to inform the pickets that he was crossing only to further union interests by organizing. Afterwards, as they entered the premises, Hansen claims that Smithback stated that he didn't want any more union talk, also inquiring if Hansen had thought over the offer to "jump Ship." When Hansen asked how much would be involved, Smithback referred him to Sager.[59]

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[58] The access to Boise Cascade was under interdict of union pickets, who apparently were protesting the presence of another nonunion contractor, B.E. & K. Construction. The latter was engaged in new construction at that site.

[59] As always, Smithback denied that he made any statement limiting union activity. However, he admits that at the time,

It is undisputed that Hansen did call Sager. At this time, he claims to have informed Sager of Smithback's sellout inquiry. Sager denied any interest in giving anything to persuade Hansen to abandon organization activity.[60] Sager then switched topics, turning to reports about Hansen's job performance. Sager charged that Hansen (1) refused to wear safety shoes,[61] (2) worked without his hardhat,[62] and (3) had a production problem. Hansen, who had not

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Hansen told him "right then and there" that he had no intention of stopping talking union on the jobsite, while inquiring as to who told Smithback that he could not do so on Boise-Cascade property. Here again, the question emerges as to whether Hansen would have concocted or assumed such a constraint, while communicating both to Sager and Smithback that it would be ignored, if not instructed to refrain from union activity. In Smithback's case this declaration is even more curious, considering Smithback's sworn testimony that he had never mentioned to Hansen that the Union could not be discussed.

[60] Sager does not deny that this phone call was initiated by Hansen. While he denied making a bribery offer, he did not contradict Hansen's testimony that the matter was raised.

[61] Smithback offered to take Hansen to the shoe store on three separate occasions. The first time the store was closed, the second, Smithback did not show up on the lunchbreak as he had promised, and the third time, on Thursday, the day of termination, the shoes were actually purchased. It is noted in this regard that Hansen was not permitted to drive his vehicle to and from the Boise-Cascade jobsite and therefore was dependent on Smithback for transportation during normal business hours.

[62] According to Hansen, he had his hat off once on the entire job, and that was while having coffee, indoors at the desk of Everett Hall, and in presence of Denny Moran, both employees of Boise Cascade, who were also hatless.

previously been criticized, reacted, "that's Bullshit," arguing that Smithback was only concerned about union activity. Sager said he would call Hansen back that evening after discussing the situation with Defferding. However, according to Hansen, Sager again instructed Hansen to refrain from union activity.

During the noon recess, Hansen sought to convince the crew as to the merits of union organization. He avers that he then suggested that Bob Jensen, the business agent from Local 294, be contacted with the further observation that, if an election petition were filed, the men could be in the Union by Christmas. Smithback, according to Hansen, jumped up, and in the presence of Grow, Steiner, and Reinders attempted to silence Hansen, again stating that he did not want Hansen talking to the men about the Union on the road, at the cabin, or on the job. Hansen then replied that he thought it would be good if Jensen came out and "we'd have a little meeting and petition for an election." Grow said that the meeting would be held at the bottom of the lake, asking Hansen if he had good anchors.

Smithback relates that just prior to this noontime meeting Reinders and Steiner were complaining at the means used by Hansen in soliciting them to sign with the Union.[63] He described Reinders as so upset, he had packed his bags, threatening to leave the project. Grow, who had just returned was so upset he was shaking, and as Hansen continued to talk to him about the Union. Grow asked what it would take for Hansen to drop the Union and come over to T & C.

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[63] Hansen testified that he never possessed authorization cards on this jobsite.

Hansen, according to Smithback, continued pushing "little white cards for them to sign." The men reacted: "we're just not interested in the union." Grow related that when Hansen brought out the cards, he rebuffed: "you don't understand, I'm not interested, can't you get that through your head." Steiner and Reinders chimed in that Grow was speaking for them as well. Steiner confirmed that Hansen "just kept on going." At this juncture, Hansen allegedly stated, "No, I will not stop talking bout the union." Grow testified, with support from Smithback, Reinders, and Steiner that he then asked Hansen why he doesn't give up on the Union and come over to T & C.

Against, this background of resistance, according to T & C, Hansen sat back, quietly, stating "I've got an idea, let's take a vote right now." At this point, because Reinders was upset, Smithback intervened, admittedly stating "Hey guys, before you answer that, I would really rather that you talk about something else, fishing or something." Nonetheless, Hansen suggested that the men take a vote, whereupon Smithback stated, "I'd rather we not take a vote." At that point, the conversation ended. However, as Steiner testified, Reinders grew nervous. He left to call his wife, a habit he developed when stressed. According to Smithback, after 20 minutes, Reinders returned telling Smithback that "if this thing is not settled today, I'm going home tonight."

Reinders testified that the [*sic*] was upset to the point of violence in consequence of Hansen's actions during the lunchtime incident. He described the provocation as follows:

We were trying to get work done and he kept bring it [the Union] up and it didn't stop and we were sitting there eating lunch and the feeling that I got was like he sorta felt like he was losing his battle organizing us because no matter how many times he asked us, we'd tell him no. We're not interested.

We'd tell him that individually even as a group when we were all there, we'd tell him "no," but he just kept at it and kept at it.

. . . .

And while we were sitting there at lunch, Malcolm was sitting . . . directly across from me and he had a way of starting these stories no matter if it was about his mother or his father or his friends and it would end up as a reason why we should join the union.

. . . .

And at lunch it was like he was grasping for straws. We're sitting . . . and he's pulling stuff out of his wallet, he's got cards you know, why don't you take a look at this, it's a card to sign you up for the union . . . he had a picture card . . . referring to him as a union organizer. And he's pulling out all these receipts for union dues . . . and he just kept—why don't you look at it, why don't you take a look at it.

If you want, tonight we'll go down to the Flame and see the woman dancers, have a few beers. I got my friend, he'll come up and we'll get you signed up right now.

Reinders claims that he had "enough of his pushing information on me." In fact, Reinders was provoked to the point of being ready to "rap . . . [Hansen]

right up side the head," thus, freely admitting that he was ready to punch Hansen because of his repetitious efforts to solicit on behalf of the Union.[64] As others had testified, Reinders called his wife, telling her, "if things didn't improve real quick, I was coming home. . . . I wasn't going to put up with it anymore." [65]

After the noontime incident, Sager's earlier criticism of Hansen provoked a confrontation between Hansen and Smithback. Thus, in the presence possibly of Denny Moran and Everett Hall, both employed

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[64] Reinders justified his reaction by describing an experience in which he was roughed up when he declined to join a union during an organization campaign in California. Reinders admits that he previously mentioned this experience to Hansen, who indicated that his people "weren't that way, they didn't beat up on people and . . . it was his policy to be up front and honest and they are not violent people." Despite this, and although Hansen had engaged in no untoward conduct on his own, Reinders testified that he was suspicious as to what he might do. However, later that afternoon, having been calmed down by Smithback, Reinders testified that he called on Hansen to tell him that he was the best organizer "I've ever come up against." Hansen replied that there was no hard feelings against any of the crew, and that they were "some great guys." Reinders also expressed that Hansen had a lot of guts staying in the cabin with the others after announcing he was a union organizer.

[65] Reinder's edginess about Boise Cascade might well have been influenced by factors totally unrelated to unionization or Hansen. A young man of 25, he had been married only 7 months. He had an infant daughter. He received only 2 days' notice of his Boise-Cascade assignment, a 10-hour drive from his home in Oshkosh. This was his first job for T & C outside Wisconsin, and in the past, he had routinely commuted to projects spending nights at home. Admittedly, his wife was not thrilled with this development.

by Boise Cascade.[66] Hansen relates that the following ensued:

> I said to Rod, "I understand you are not satisfied with my work." I said to Denny Moran and Everett Hall, "Are you satisfied with my work?" [They replied] "Oh we're satisfied. We're satisfied with all you people's work." Smithback said, "Well, you don't have to worry about [it] if they're satisfied. It's me, and I was only dissatisfied on Tuesday morning.

According to Hansen, Smithback used that occasion once more to instruct him not to talk "about the union or anything else." [67]

Smithback, according to Hansen, backed off, immediately telephoning Sager stating, "Ron, that was bullshit about Mickey's production. . . . Steiner and Reinders were setting the pace and he was moving the scaffolding for them and handing out material."[68] However, Hansen was then called to the phone, whereupon Sager instructed him to call Buelow over at Ameristaff. He did, with Buelow, stating as follows:

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[66] Reinders, Steiner, and possibly Mike Grow were also present.

[67] Smithback admits that Hansen accused him of lying on the productivity question, demanding that he call Sager back immediately to straighten out the issue. Smithback claims that he argued back that his criticism was valid and there was nothing to straighten out. Smithback does not aver that Hansen was ever informed of the other alleged discrepancies in his job performance.

[68] Sager denied having received any such report. He could not recall whether Smithback had told him that Hansen's productivity problem was limited to the above incident.

> . . . Mickey . . . we got a little flapdo. The State Board of Electricity won't let me hire people from Minnesota to work as an electrician because we haven't got a license so I guess whatever contract I have with you has been done.

When Hansen inquired as to whether T & C would pick him up on its payroll, Buelow told him to call Sager.

Hansen then called Sager, asking if he would be working directly for T & C. He was told "absolutely not." Hansen claims that he was never given any reason for T & C's refusal to hire him, a fact or facts, which Hansen states remain unknown to him. Sager disputes this, but claims to have described unimproved "low productivity" as the sole cause.

c. *Analysis*

The issue here is limited to examination of T & C's grounds for refusing to retain Hansen on its payroll.[69] T & C's termination of its agency contract with Ameristaff, was impelled by Minnesota law, and

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[69] The fact that Hansen took this job to further organizational interests is of no comfort to T & C. Hansen was a rank-and-file union member, who served that body in no official capacity. From all appearances, he was dependent financially on employment as a journeyman electrician in the construction industry. The fact that, in connection with his employment at the Boise-Cascade site, he was reimbursed by the Union for wage and benefit differentials does not place him in the category of the paid union organizer whose eligibility for a Board remedy was considered in *H. B. Zachry Co.*, 289 NLRB 838 (1988), enf. denied 886 F.2d 70 (4th Cir. 1989). Thus, that case is plainly distinguishable, and Hansen's intention to organize was not incompatible with his basic employment needs and objectives and did not debar him from statutory protection. See, e.g., *Circo Resorts*, 244 NLRB 880, 887 (1979), enfd. as modified 646 F.2d 403 (9th Cir. 1981).

was plainly legitimate. However, the purity of motive underlying this transaction did not carry over, ipso facto, to justify the refusal by T & C to employ Hansen on a direct basis. As of September 14, T & C still could not operate at Boise Cascade unless its direct payroll included a locally licensed electrician.[70] Moreover, although Sager testified that temporary agency employees are made permanent only 5 to 10 percent of the time,[71] common sense dictates that the temporary will always be retained if he is available, competent, needed on an ongoing job commitment, and where agency commissions considered against other factors will not make that an unprofitable decision. Thus, for purposes of this proceeding the motive underlying its failure to utilize Hansen is determinative of the 8(a)(3) and (1) allegations.

Economic reality neutralizes any debate concerning T & C's posture with respect to union organization. As a merit shop employer, it is dedicated to a method of operation in the highly competitive construction industry which is not compatible with wage and benefit standards sanctioned by affiliated craft unions such as the IBEW.[72] (C.P. Exh. 1.) There is

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[70] In this light, it is understandable that Buelow, on being informed of Ameristaff's termination, instinctively went to the trouble of preparing paper work facilitating Hansen's tranfer to the payroll of T & C.

[71] T & C observes that it had never retained an agency employee on its payroll after a mere 3 days' employment. However, it was previously unaware of Minnesota licensing constraints and there is no evidence that T & C was ever before in a position where continuation of a project depended on such action.

[72] Testimony on behalf of T & C that union affiliation was a matter of no concern to the interviewers was so out of

no real dispute that on the second day of his employment, Hansen announced that he was a union organizer, and persisted in organizing on behalf of that Union. On the heels of these purely verbal and noncoercive efforts, Sager testified that he became convinced that a decision had to be made on Hansen's status when he received reports that employees were offended, claiming harassment and low morale. Finally, Sager admits that, as of September 14, when T & C declined to put Hansen on its payroll, at least two licensed electricians were needed to discharge its responsibilities on the Boise-Cascade job. It, thus, appears that the elimination of Hansen took priority over the risk that the job would be shut down for lack of a licensed electrician.

The foregoing is sufficient to give rise to the inference that union activity was at least part of the motive for Respondent T & C's failure to place Hansen on its payroll, thus, in accord with *Wright Line*, supra, placing the onus on T & C to demonstrate that this would have taken place even in the absence of Section 7 activity.[73] T & C's numerous witnesses

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comport with economic realities as to raise question as to what else the defense might expect me to believe. This reaction was hardly allayed by the observation by T & C's attorney that "T & C's only concern with an applicant's union membership was that the applicant might be fined for coming to work for T & C."

[73] The claim of discrimination is bolstered by Hansen's testimony that the effort to discourage his union involvement was the subject of a variety of independent 8(a)(1) violations. Thus, he testified that Smithback repeatedly stated that he could not engage in union activity anywhere, and threatened termination if he did so. Smithback, with cor-

attempted to substantiate that Hansen was a poor worker, who failed to meet productivity standards, and who failed to perform in a craftsmenlike manner. Its evidentiary case was shifting, replete with contradiction, and in the end, furnished a strong suggestion that union activity played an important role in it decision not to retain Hansen. In sum, the defense is structured upon a composite of lies made possible through T & C's access to a willing combination of highly biased witnesses.

Those responsible for eliminating Hansen allegedly acted on reports from Smithback, who in large measure was dependent on reports from Steiner and

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roboration from the T & C employees, denied that this was true. In fact he denied ever mentioning the Union in his attempts to curtail Hansen's loquaciousness. This despite, an awareness that the other crew members had told Hansen during breaks that they did not want to discuss the Union, and his admission to a strong feeling that Hansen was wrong in continually pushing the Union on them in these circumstances. Hansen is preferred over claims that Smithback resisted the temptation of bringing Hansen under control. Based on Hansen's testimony, I find that Smithback, on his own, attempted unlawfully to interdict Hansen's union activity in these particulars, but also inquired as to whether Hansen could be bribed to cease his organizational efforts. Yet, at the same time, I did not believe Hansen's attempts to implicate Sager in a prohibition on union activity. Thus, Hansen testified that in two, separate telephone conversations with Sager, the latter instructed him not to talk about the Union. Sager denied having made the statements. In context, it was unlikely that Sager would have made these remarks, considering what was known about Hansen at the time of his hire, and after he had announced organization as his goal. I credit Sager, and shall dismiss the 8(a)(1) allegation involved.

Reinders.[74] However, the indictment of Hansen by Steiner and Reinders apparently lacked the attention it deserved. Thus, Smithback, according to T & C's witnesses, was advised on Tuesday of the incidents involving Hansen's responsibility for the broken band saw, the improper bending of pipe, the cutting of struts to erroneous lengths, and misconceptions about how pipe should be measured, all serious discrepancies. Smithback, who claims that, but for the licensing problem, he would have terminated Hansen that first day, executed a diary entry for that day which indicts Hansen with flawed "production," but says nothing about poor quality of work. Steiner, the next day, added Hansen's predilection to break drill bits to the list of quality infractions, reporting this as well to Smithback. The latter's diary for that date is critical of Hansen, but solely on the basis of excessive "talking." No reference is made to a continuing propensity to mishandle and damage tools or to produce bad parts. The pattern continued on Thursday. Steiner and Reinders once more accused

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[74] Steiner, an apprentice, and Reinders, a journeyman, who could not qualify to take the Minnesota licensing exam because for lack of creditable experience, laid the foundation for the attack on Hansen's workmanship. Hansen is an experienced journeyman with many years in the trade. His employment record does not suggest either a lack of competence or that he was prone to be inefficient. In my opinion, where possible, Hansen provided well reasoned explanation as to the erroneous nature of assumptions underlying the accusations of these young men, still in their twenties. My mistrust of Steiner and Reinders was sufficiently deep as to warrant rejection of their testimony in areas which were totally subjective and incapable of refutation by Hansen, and for that reason, beyond his ability to register clear and straightforward denials.

Hansen of faulty work methods on that day, yet Smithback's diary entry did not stray from the familiar:

> Malcolm Hanson did improve the quantity of work he did today. Still not up to our expectations. And he still spends much time B.S.ing with mill employees and w/our employees.

Smithback, while testifying under oath, possessed a clear grasp of the bad parts, tool breakage, and abuse of equipment described by Steiner and Reinders. It is difficult to understand why these breakdowns in Hansen's craftsmanship were given so little attention at the time. The offenses were specific. They reflected serious failures in craftsmanship. They were reported in timely fashion. Yet, the objective trial does not lead to any suggestion that, by September 14, quality had become an element of T & C's case against Hansen.

Like the diary notes, higher management did not seem to dwell on the quality of Sager's performance. Sager and Defferding concentrated on productivity, describing "disharmony" as a triggering event.[75]

[75] Neither Defferding, nor Sager indicated that they were aware that Hansen had abused or misused tools or equipment. Defferding assertedly received daily reports from Smithback concerning Hansen. However, his knowledge of a quality problem appears limited to a report from Smithback on Thursday morning. He claims that Smithback reported that "[Hansen's] production went up, [but] the quality went down when we had to remove and replace most of the work that Mr. Hansen put in because of poor workmanship." In this area, Sager's testimony was vague. He avers that Smithback on Tuesday mentioned some bad cuts on a unistrut or piece of pipe. He also asserts that on Thursday morning Smithback

Indeed, well after the fact, Vice President Stephenson in his letter of October 23, merely described Hansen's work problem as "productivity." (R. Exh. 5.) Surely, these management officials were conversant with industrial lexicon and that, given its ordinary meaning, a "productivity" problem relates to the quantity of an employees work, rather than ones ability to turn out quality parts without destroying equipment. Indeed, in light of T & C's presently, professed position that Hansen had set out deliberately to sabotage the job, one would think that these alleged indiscretions would occupy the centerpiece for objections to Hansen's employment. They obviously were afterthought, if not totally contrived.

The testimony of Sager concerning the triggering circumstances is certainly more indicative of what actually occurred than the testimony of Smithback, Steiner, and Reinders. He testified that on Wednesday, September 13 "I didn't know if we were going to keep Malcolm . . . we were evaluating him for productivity and safety violations." However, as I understand Sager's testimony, it was not until September 14, that Hansen's status came to a head. That afternoon Sager received a telephone call from Smithback who reported that because of Hansen, Reinders was "extremely nervous and upset" and he wanted to leave the job immediately "for his own safety." Reinders also mentioned that he was fed up "with

called and "mentioned something about some of the mistakes or some of his work specifics and I don't recall because it wasn't germane at the time, I think the decision had pretty much been made at that juncture." On the contrary, it clearly emerges from Sager's testimony that reports spawned by the subsequent lunchtime incident actually produced the final judgment on Hansen.

all the talk" and that there was a real problem with morale on the job. It is apparent that Smithback's report sprung from Reinders' reaction to the pro-union overtures made by Hansen during the noon break. In consequence, Sager apparently sought out Defferding, advising as follows:

> [W]e've got to make a decision here, the guy is affecting the morale of our people. I know that a couple of our people were upset and one extremely agitated, he was getting a short fuse and one of the guys felt intimidated and wanted to leave the job site. I said, "listen, I don't care if we aren't working at that jobsite, I've got to look out for our personnel, we can't do that to them."

Sager did not testify that, in that conversation, any other grounds for termination were mentioned to Defferding.[76]

In consequence, Sager testified that he called Smithback, stating "Hey, a decision has been made that we are going to let Malcolm Hansen go from Ameristaff. . . . I'm going to call Steve Buelow and tell him the situation and have Malcolm call Steve Buelow . . . in the afternoon." Smithback was given the "OK" to wait till after work before informing Hansen.

In explaining the discharge to Buelow, according to Sager's testimony the harassment issue went unmentioned. He claims to have told Buelow that, "the

[76] On cross-examination, Sager admitted that the morale problem was a factor contributing to the decision but denied that "it was a big part of it." Considering the chronology described on the face of his own testimony, I am convinced that the noontime incident was the proverbial "straw" that broke the "camel's back."

guy's really causing problems, he's wandering around . . . we have low productivity from him . . . . he just got his safety shoes today. . . . [H]e's just not an employee or potential employee that we would look to be hiring." According to Sager, Buelow stated that rather than create issues about productivity, he would simply tell Hansen that "temporaries" had been barred from the job.[77]

Sager, on cross-examination acknowledged that the safety shoes and hard hat issues were not the reason for terminating Ameristaff on this job, and did not contribute to T & C's decision not to place Hansen on its payroll. The morale problem that Hansen was causing on the job was admitted to be a "part of it." According, to Sager the other factor was Hansen's productivity, details of which he could recall. Sager

[77] Buelow testified that it was on Wednesday morning, September 13, Sager instructed: "we could not have Mickey on the job." In his words:

> I was informed [by Sager] that John Quinn . . . had informed them [T & C] that Malcolm could not be there on our payroll.

With this information, Buelow claims that he instructed his assistant "to cut an invoice" permanently placing Hansen on T & C's payroll. This was countermanded later that afternoon, when Sager informed that T & C at no time indicated that they would pick up Hansen, and that they would not do so in that they had received bad reports concerning his productivity, that a man with less experience could bend pipe quicker, and that Hansen also had violated safety policies. It is noted that John Quinn testified that his conference with Stephenson took place on Monday, September 11. While T & C's good faith, in complying with obligations to the State of Minnesota is of no relevance here, the timing described by Buelow is more consistent with Quinn's uncontested testimony.

at no time made reference to the alleged failure of Hansen to perform in a workmanlike manner.

Defferding knew the difference between poor quality and poor productivity. Yet, in describing his reasons for the termination, he did not zero in on the bad parts and attempted to deflect the disharmony issue. His position concerning Hansen was based entirely on daily telephonic reports from Smithback.[78] The first, actually, was late Tuesday afternoon, September 12. Smithback called, complaining that he was disappointed with Hansen's output, his apparent disinterest in performing "physical labor" and his appearance without safety shoes.

On Wednesday, September 13, Smithback called again, complaining that Hansen was not helping with production and was missing from the job even more than the previous day, going so far as to without explanation, leave the worksite for 45 minutes to an hour. Smithback again allegedly mentioned that Hansen had been told to get his steeltoed shoes, but had not done so.

The puzzling aspect of Defferding's account arises in conjunction with a report from Smithback accusing Hansen of disrupting the crew. In this connection, the phrase "disharmony to the crew," is given a different meaning by Defferding than Sager. Thus, it will be recalled that Sager attributed such a condition to Reinders' complaints about Hansen's persistent and aggressive attempts to foist the Union on coworkers. In contrast, Defferding initially described Hansen's wandering as the cause of this disharmony. On cross-

[78] Although Defferding received Smithback's "foreman diaries," they were not available to him until September 15, after the termination.

examination, when Defferding was again given the opportunity to describe how Hansen created disharmony, he used the term to describe Hansen's constant preference for talk over work. Defferding, of course, denied knowledge as to the content or subject matter covered by Hansen on those occasions. Ultimately, Defferding admitted that later on Thursday, Smithback called back, recommending that Hansen be removed because "it was no longer possible to run a harmonious crew and still have Mr. Hansen on that crew."

Smithback's reference to disharmony was far narrower than Defferding's definition. He does not suggest that it related to any conduct other than union activity. Indeed, according to Smithback, Defferding knew that the term was used to explain Hansen's union activity during nonworking time. Thus, Smithback testified that Hansen, on Thursday, was beginning to disrupt the crew "pretty heavily" while creating "disarmony." In this connection, he specifically reported the lunchtime incident, described above, to Defferding, in terms evident in the following colloquy with the undersigned:

> JUDGE HARMATZ: Excuse me a minute, did you discuss this incident with Mr. Defferding, this lunch time on Thursday incident?
>
> THE WITNESS: Yes.
>
> JUDGE HARMATZ: Did you tell him the scenario that you described to us, did you tell him that people were upset?
>
> THE WITNESS: Yeah, told him people were upset.
>
> JUDGE HARMATZ: Did you tell him why?
>
> THE WITNESS: Yeah, I told him Randy was ready to fight or run.

JUDGE HARMATZ: And let me just go over that one more time for emphasis. The reason that these people were upset is because Mr. Hansen was constantly pushing the union on them?

THE WITNESS: Correct.

JUDGE HARMATZ: And you reported that to Mr. Defferding?

THE WITNESS: Denny, yes.

JUDGE HARMATZ: And you couldn't be mistaken about that?

THE WITNESS: No.

It was my distinct impression that the term "disharmony" more appropriately fit union activity, the subject of Reinders complaints, than the variant subjects that Defferding would place under that umbrella. In this light, the attempt to redefine, diminish, or cast aside the alleged disharmony is understandable. Sager had previously testified that "disharmony" was a factor in T & C's decision. Hansen's termination could not be upheld if provoked out of T & C's desire to appease coworkers who might have been offended by the former's attempts to organize them. Although Smithback claimed that Hansen was "hounding and badgering" the men, the testimony he offers simply shows that Hansen repeatedly solicited their support and they depeatedly declined. He was alone, the others unified. In this context, if management sought to restore harmony, statutory guarantees would require counselling those disturbed by, before condoning adverse action against, the union protagonist.[70]

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[70] In a weak attempt to associate the fears of the men with violence apparently addressed to B.E. & K. at the site, Smithback acknowledged that Hansen had told the men that his Union had nothing to do with the violence, but he could not speak for the unions engaged in the B.E. & K. dispute. At p. 89 of its postbearing brief, counsel for T & C appears to have been led by imagination in arguing that "Hansen did everything he could to make Reinders believe that the past [union violence] was repeating itself . . ." and further that "Hansen had done everything he could to play on the fears of the T & C crew and to increase the pressure on them." If anything, these assertions are refuted, rather than supported by, this record.

In sum, the defense is laden with several shifts. First the effort to demean Hansen on the quality of his work is unconfirmed by the objective evidence, and though these allegations against Hansen reflect a consistent pattern of incompetence, they were given feint attention by Sager, Defferding, or Stephenson in describing the grounds for rejecting Hansen. This discrepancy is paralleled by the events of Thursday, September 14. I am convinced that on that day, T & C personnel at the jobsite and at headquarters were preoccupied with the question of disharmony created by Hansen's persistent efforts to push the Union. Sager's testimony suggests that this was a triggering event, while Defferding would engage in a conscientious attempt, alternatively, to disguise and then, steer away from this factor.

In my opinion, it was the noontime incident that caused the breakdown in T & C's will to endure Hansen. Thus, Sager testified that, because of job indiscretions, he would have acted in terminating Hansen a day or a day and a half sooner were it not for the need for Hansen's license. Smithback, though confessing to a limited opportunity to observe Hansen on Tuesday, September 12, claims that he would have

terminated him at the end of that day for similar reasons. As matter's turned out, Hansen was eliminated on Thursday, September 14, when nothing had changed —T & C still had no assurance of replacement, and the licensing problem persisted.[80] Indeed, the urgency to remove Hansen is even more suspect when one considers Defferding's testimony that, as of September 14, T & C had other licensed electricians lined up to report on this job. Apparently, T & C could not wait for the arrival of these replacements. Moreover, even with the hiring of replacement Ensign, Sager testified that the need for qualified journeyman did not end, for he relates that in the days that followed Hansen's termination, T & C did not "know if we were going to be able to man the job with licensed electricians." During the following week, as he relates: "The President of our Company was making the decision . . . whether or not we were going to continue at Boise Cascade or back out entirely."

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[80] A replacement was obtained, but not until after the decision to eliminate Hansen. Sager testified that, he was not involved in the recruitment, but that a licensed electrician, Fred Ensign, was hired after the Hansen termination on Friday, September 15, thus, allowing the job to progress. Defferding was instrumental in the hiring of Ensign. On Thursday, September 14, Defferding claims to have telephoned Guy Martin of B.E. & K., stating, "we were to be releasing through Ameristaff . . . our licensed . . . person and that we would be requiring an electrician for a short term basis because we had some other people coming on, that we need somebody . . . with a license." B.E. & K. obliged and effective Friday, September 15, Ensign was transferred from B.E. & K.'s payroll to that of T & C. Ensign was hired sight unseen, solely upon B.E. & K.'s recommendation in this regard, and apparently without independent basis for evaluation.

In my opinion, the defense in Hansen's case was structured on a thinly veiled attempt to mislead as to the true reasons for T & C's action, and, since lacking in credible support, fails to rebut the inference of unlawful motivation. Moreover, Sager's own testimony, and the efforts by Defferding to shy away from the noontime encounter, strongly suggests that the outrage of coworkers concerning Hansen's protected activity during that incident was the pivotal event leading to his termination. This view of the evidence actually bolsters the General Counsel's position, and, in any event, it is plain that T & C has failed to substantiate by credible evidence that Hansen would have been removed even if he had not engaged in organizational activity. It is concluded that the Respondent T & C violated Section 8(a)(3) and (1) of the Act in this respect.

4. The individual refusals to hire

a. *Preliminary statement*

The third area of discrimination pertains to alleged illegal refusals to hire in connection with telephonic expressions of employment interest by Local 343 members Charles Evans on September 13, and Roger Kolling, on September 20.[81] Neither appeared at the Embassy Suites.

The separate routes taken by Kolling and Evans did not lead to employment.

Independent 8(a)(1) violations are also attributed to Respondent in this regard. They include alleged interrogation of Kolling by Sager and Defferding, and

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[81] Local 343, like Local 292, has no jurisdiction over International Falls. Its geographic sphere consists 39 counties in southern and western Minnesota.

a threat by Sager to Evans that he would have to resign from the Union if hired.

b. *Richard Kolling*

Kolling, since 1986 and during the events in issue here, served as a full-time Local 343 business representative. He denies that union sources led him to apply for work with T & C. Instead, he claims that on September 18, he received a job lead from the Minnesota State Employment Service. (G.C. Exh. 16.) He denies any prior awareness of T & C.

On September 20, he acted on the referral by calling T & C. He spoke to Sager. Kolling relates that Sager inquired as to his union status, but that Kolling denied any affiliation with unions, indicating that he was not a union member, instead stating that he had operated as an "open shop" contractor in Rochester, Minnesota. After discussing the scope of Kolling's operation as a contractor, Sager put Defferding on the phone. Defferding also inquired as to Kolling's union status, with the latter again entering a denial, while ultimately stating: "why all the . . . union questions . . . because I was really . . . trying to get a job." Kolling was asked by Defferding if he would accept work in International Falls, while indicating that the rate was $15 hourly, with travel allowances. Defferding stated that he would mail out an application after Kolling furnished a resume. Kolling advised that he would do so.

Sager acknowledged that he participated in such a conversation with Kolling. The latter identified himself as an electrical contractor. Concerning Kolling, Sager testified, "I remember asking him what kind of contractor he was . . . was he a residential, commercial or industrial, licenses that he held, was he a

union contractor or a non-union contractor, does he work with either . . . because we subcontract work out . . . to subcontractors for different projects." Kolling said he was just looking for temporary work because things were slow at the time. They then discussed the Boise-Cascade job, whereupon Sager put Defferding on the phone.

Defferding testified that they first discussed Kolling's industrial experience. Later, when union affiliation arose, Defferding assertedly stated that T & C had "no problems with that." Kolling was informed of T & C's interest, and was asked if he had a resume. He said he did, whereupon Defferding requested that he forward it immediately.[82]

Kolling never did so. According to the General Counsel, Kolling's failure to submit a resume did not defeat the allegation that T & C unlawfully declined to hire him. According to Kolling, he soon realized that any resume would include references betraying his denials of union affiliation. For this reason, on September 21, he called Sager to disclose his union ties. Sager indicated that this was not a concern. Kolling then indicated that he wished to continue the process by completing an application. According to Kolling, though Sager agreed to forward the application, it was never received. Sager admits to this conversation, but claims that he suspected that Kolling was trying to get something that he shouldn't so Sager was "on his guard." During the conversation, Kolling informed Sager that the September 20 conversation had been taped and that he was concerned about

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[82] Kolling failed to relate that he ever submitted the resume. According to his own testimony, Defferding told him to do so before an application would be forwarded.

Sager's questions concerning the Union.[83] He claims that, because of the taping, an application was sent out to Kolling. However, to the Company's knowledge, it was never completed and returned.[84]

In my opinion, the General Counsel has failed in this instance to produce credible, prima facie evidence warranting a finding that Kolling's failure to land a job was based on anything other than his own inaction. The probabilities support the testimony of Sager,[85] and I am convinced that an application was duly forwarded, but never returned. The submission of a completed application was understood by all to be a critical requisite for hire, and this omission by Kolling, offered the sole, nondiscriminatory reason for his inability to secure employment. The 8(a)(3) and (1) allegations in his case shall be dismissed.

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[83] Kolling had two conversations with T & C representatives. He attempted to tape both. He claims that the tape of the first did not take. In any event, no tape or transcript of a tape was offered in evidence.

[84] Kolling's name appears on R. Exh. 11, a computer list of all sent applications. The document indicates that his application was mailed on September 22.

[85] Kolling was not a persuasive witness and his uncorroborated testimony was an unsuitable basis for findings prejudicial to T & C. It is true that Sager admittedly asked Kolling if he had operated as a union contractor. However, such an inquiry, when addressed to an individual who identifies himself as an employing enterprise, rather than an employee, does not strike as inherently coercive. No rationale which reasonably would support a finding of illegality in this context has been offered. The 8(a)(1) allegations implicating Defferding and Sager in proscribed interrogation are dismissed.

c. *Charles Evans*

In September 1989, Evans was an unemployed licensed electrician and a member of Local 343. He was contacted by his business representative and told to call the 414 telephone number which corresponded to that appearing in the September 11 edition of the Minneapolis Star Tribune (G.C. Exh. 4.) On September 13, he did so, speaking to Lorrie of Ameristaff. The latter questioned him as to qualifications and work history, and then asked if he were union or nonunion. He declared himself as union, inquiring as to why she would ask. Lorrie allegedly said, "We have to know whether you are union or nonunion because we don't put union people on nonunion jobs."[86] According to Evans, she then said she would have Buelow contact him later in the week.

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[86] The complaint, over denial, alleges that "Lori" is an agent of Ameristaff. It further alleges that the Respondents violated Sec. 8(a)(1) by her interrogation of Evans during this phone conversation. Once more, I am left to my own devices, for the General Counsel has failed to brief either issue. On the merits, the task is rudimentary, for Evans' account was uncontradicted and there is every reason to believe that this occurred. On the question of agency, Buelow acknowledged that he was assisted by someone named Lori, and that she was relegated to the task of answering the phone, and performing the initial screening. This latter function, included inquiries concerning union status. In this light, the testimony of Evans completes the circumstantial chain indicating that he and Buelow were describing the same individual, and that she was an agent whose conduct was binding on Respondent Ameristaff. In context of her other remarks, this interrogation of a job prospect was clearly coercive and violative of Sec. 8(a)(1). Moreover, the unfair labor practice, having been committed within the spectrum of operations for which Ameristaff had been retained by T & C, is deemed binding on the latter.

However, on September 13, Evans telephoned Lorrie again, questioning her once more as to the interest in his union affiliation. She reiterated her explanation, but inquired as to whether Evans would work nonunion. Evans signified that he would.

Evans testified that he never received the promised phone call from Buelow. However, Buelow relates that when Evans called Lorrie the second time, the call was transferred to him. Evans allegedly complained that in his earlier conversation, Lorrie had asked him illegal questions about his union affiliation, observing further that this was totally unnecessary. Buelow claims that he explained that Ameristaff works with union and nonunion contractors, including the contractor at Boise Cascade. Evans stated that he wanted work on that project. Buelow testified that he would have a T & C official call him, because Ameristaff could not hire him for that job.

Evans admits that he was subsequently contacted by Sager. The latter allegedly informed him that it was T & C's position that "they didn't hire any . . . union people at the job site, that if I wanted to work there, that if I wanted to work there that I would have to drop my union affiliation." Evans gave no definite answer, whereupon Sager told him to give him a call if he changed his mind about accepting the job. There was no further communication between Evans, Ameristaff, and/or T & C.

Sager recalled a phone conversation with Evans. He related that when he informed Evans that the job was at Boise Cascade in International Falls, Evans expressed concern at the violence he had read about in the newspapers at that site. When Sager pointed out that those reports concerned a new construction job and not the maintenance work that T & C was

engaged in, Evans stated, "Well I don't know if I'd be willing to go up there and work under those circumstances." Evans was again asked if he would be willing to take the job, but Evans again replied, "I don't know if I would or not." According to Sager, he told Evans to give him a call if he "changed his mind." Sager denied telling Evans that union people would not be hired at that jobsite, or that Evans would have to drop his union affiliation if he wanted to work there.

On cross-examination, Evans acknowledged that he was concerned about reported violence at the Boise-Cascade site, and that Sager attempted to assuage him of this concern, while advising him at length of the precautions that had been taken to neutralize the "trouble." Evans insists, however, that it was not the violence but the trouble he would face from Local 343 if he renounced union membership that discouraged him from accepting the job.

In this light, I credit Sager and Buelow, and conclude that Evans expressed disinterest in employment at Boise Cascade, that no statements were made concerning any nonunion policy or union resignations by Sager, and that T & C at no time refused him employment by reason of union affiliation. In short, in this instance the General Counsel has failed to adduce credible proof that proscribed considerations played any part whatever in Evans' failure to obtain a job at Boise Cascade. The 8(a)(3) and (1) allegation in this respect shall be dismissed.

CONCLUSIONS OF LAW

1. The Respondents, Ameristaff and T & C, are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent Ameristaff is the agent of Respondent T & C for the purposes of soliciting job applicants, arranging for the hire and completion of applications for those prospects, and the maintenance of payroll and employment records of those hired for Respondent T & C's account at the Boise-Cascade jobsite.

3. Local 292 and 343 of the International Brotherhood of Electrical Workers are labor organizations within the meaning of Section 2(5) of the Act.

4. Respondent T & C on September 7, 1989, violated Section 8(a)(3) and (1) of the Act by refusing to interview and consider for employment the job applicants listed below because of their union membership:

Ken Axt	Red Larson
Steve Claypatch	Greg Shafranski
Steve Leyendecker	David Hagen
Robert Hallman	Bob Printy
Harley Barton	Michael Priem

5. The Respondents, T & C and Ameristaff, on September 13, 1990, violated Section 8(a)(1) of the Act by interrogating a job applicant concerning union activity.

6. Respondent T & C, on September 13, 1990, violated Section 8(a)(1) of the Act by banning employee union activity during nonworking time, and by threatening discharge for engaging in such activity.

7. Respondent T & C, on September 13, 1990, violated Section 8(a)(1) of the Act by inquiring as to what it would take to induce an employee to refrain from union activity.

8. Respondent T & C, on September 14, 1989, violated Section 8(a)(3) and (1) of the Act by refusing to retain Malcolm Hansen because of his union activity.

9. Respondent T & C did not, since September 13, 1990, refuse to employ Charles Evans, or from September 20, 1990, refuse to hire Roger Kolling for reasons proscribed by Section 8(a)(3) and (1) of the Act.

10. Except as found in paragraphs 4, 5, 6, 7, and 8 above, the Respondents did not engage in any of the unfair labor practices set forth in the complaint.

THE REMEDY

Having found that Respondent T & C has engaged in certain unfair labor practices, it shall be recommended that it cease and desist therefrom, and take certain affirmative action deemed necessary to effectuate the policies of the Act.

It having been found that Respondent T & C, in effect, terminated Malcolm Hansen in violation of Section 8(a)(3) and (1) of the Act, it shall be recommended that it be ordered to reinstate him to his prior position and make him whole for earnings lost by reason of the discrimination against him.

Having found that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire the employees named below:

Ken Axt	Red Larson
Steve Claypatch	Greg Shafranski
Steve Leyendecker	David Hagen
Robert Hallman	Bob Printy
Harley Barton	Michael Priem

it shall be recommended that they be offered immediate employment in positions for which they have applied and are qualified, to the extent vacancies exist, and they shall be made whole for any earnings lost by reason of the discrimination against them.

Backpay due under the terms of this Order shall be computed on a quarterly basis as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and shall be reduced by net interim earnings, with interest computed as specified in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). All reinstatement and backpay recommendations are subject to the procedures discussed in *Dean General Contractors*, 285 NLRB 573 (1987), and *Haberman Construction Co.*, 236 NLRB 79 (1978).

With respect to Respondent Ameristaff, with one exception, all unfair labor practices found, occurred outside the scope of its authority. The unlawful discrimination and coercive conduct imputed to T & C was effected by that firm at times and under conditions where its authority was exclusive. Ameristaff was in no position to influence the unlawful failure at Boise Cascade to retain Hansen or the termination of interviews at the Embassy Suites. In this light, the remedial burden imposed on T & C should not be lightened by any form of shared relief between these parties, and to do so, in the circumstances, would penalize Ameristaff for having a business relationship with the perpetrator of unlawful conduct.

Respondent Ameristaff committed a single act of unlawful interrogation. In that connection, the findings should be sufficiently instructive to make entry of a formal order against Ameristaff a needless exercise. The incident is remedied adequately through

the Order recommended in the case of T & C. For this reason, and considering the nature of this singular violation, together with Ameristaff's method of operations, no remedy shall be recommended in its case.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended [87]

ORDER

The Respondent, Town & Country Electric, Inc., Appleton, Wisconsin, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating job applicants concerning their union membership.

(b) Instructing employees to cease engaging in union activity during nonworking time, and threatening them with discharge if they do not comply.

(c) Asking employees whether they could be bribed to refrain from engaging in union activity.

(d) Discouraging union activity by refusing to hire, terminating, or in any other manner discriminating against employees with respect to their hours, wages, or other terms and conditions or tenure of employment.

(e) In any like or related manner interfering with, coercing, or restraining employees in the exercise of the rights guaranteed by Section 7 of the Act.

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[87] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer immediate employment to the employees listed below in positions for which they applied and qualify or, if nonexistent, to substantially equivalent positions, and make them whole for losses sustained by reason of the discrimination against them, with interest, as set forth in the remedy section of this decision:

Ken Axt	Red Larson
Steve Claypatch	Greg Shafranski
Steve Leyendecker	David Hagen
Robert Hallman	Bob Printy
Harley Barton	Michael Priem

(b) Offer Malcolm Hansen immediate reinstatement to his former position or, if nonexistent, to a substantially equivalent position, and make him whole for losses sustained by reason of the discrimination against him, with interest, as set forth in the remedy section of this decision.

(c) Remove from its files, delete, and expunge any and all reference to the unlawful termination of Malcolm Hansen, notifying him that said action has been taken, and that said termination will not be used against him in the future.

(d) Preserve and, on request, make available to the Board and its agents for examination and copying, all payroll records, social security records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its facilities in Appleton, Wisconsin, and International Falls, Minnesota, copies of the attached notice marked "Appendix."[88] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[88] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT coercively interrogate job applicants concerning their union membership or preference for union or nonunion work.

WE WILL NOT instruct employees to cease engaging in union activity during nonworking time or threaten them with discharge if they do not comply.

WE WILL NOT ask employees whether they could be bribed to refrain from engaging in union activity.

WE WILL NOT discourage union activity by refusing to hire, terminating, or in any other manner discriminating against employees with respect to their hours, wages or other terms and conditions or tenure of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the

exercise of rights guaranteed them by Section 7 of the Act.

WE WILL offer immediate employment to the employees listed below in positions for which they applied or, if nonexistent, to substantially equivalent positions, and WE WILL make them whole for losses sustained by reason of the discrimination against them, with interest:

Ken Axt	Red Larson
Steve Claypatch	Greg Shafranski
Steve Leyendecker	David Hagen
Robert Hallman	Bob Printy
Harley Barton	Michael Priem

WE WILL offer Malcolm Hansen immediate reinstatement to his former position or, if nonexistent, to a substantially equivalent position, and make him whole for losses sustained by reason of the discrimination against him, with interest.

WE WILL remove from our files, delete, and expunge any and all reference to the unlawful termination of Malcolm Hansen, notifying him that said action has been taken, and that said termination will not be used against him in the future.

TOWN & COUNTRY ELECTRIC, INC.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1984 367147 20010